82-1306

No.__________

In The

Supreme Court of the United States

October Term, 1982

COLUMBIA GAS OF WEST VIRGINIA, INC.,
Petitioner

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS E. MORGAN
ALLAN E. ROTH
ANDREW J. SONDERMAN
99 N. Front Street
P.O. Box 117
Columbus, Ohio 43216-0117
(614) 460-2549

CHARLES R. MCELWEE
WILLIAM C. PORTH, JR.
LOVE, WISE, ROBINSON & WOODROE
Charleston National Plaza
P.O. Box 951
Charleston, West Virginia 25323
(304) 343-4841

Attorneys for Petitioner

No.__________

In The

Supreme Court of the United States

October Term, 1982

COLUMBIA GAS OF WEST VIRGINIA, INC.,
Petitioner

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUESTIONS PRESENTED FOR REVIEW

1. Does West Virginia's engaging in commercial protectionism constitute a violation of the Commerce Clause of the United States Constitution?

2. Does West Virginia's denying Columbia recovery of Federal Energy Regulatory Commission ("FERC")-approved transportation charges, and instituting standards for disregarding FERC-approved wholesale rates constitute an encroachment upon the FERC's jurisdiction under the Natural Gas Act, and a violation of the Supremacy Clause of the United States Constitution?

3. Does West Virginia's repricing of Columbia's synthetic natural gas purchases in accordance with standards unarticulated at the time of such purchases constitute a deprivation of Columbia's property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

4. Does West Virginia's action, resulting in a rate of return to Columbia that is admittedly inadequate, constitute a contravention of the constitutional standards enunciated in the *Hope, Bluefield,* and *Permian Basin* decisions of this Court and the *Virginia Electric* decision of the Supreme Court of Appeals of West Virginia, and result in a confiscation of Columbia's assets in violation of the Fourteenth Amendment to the United States Constitution?

5. Does West Virginia's treating of other gas utilities in West Virginia, which are SNG customers involved in a business substantially similar to that of Columbia, differently from Columbia constitute a denial to Columbia of the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES IN COURT BELOW

The Petitioner in the Supreme Court of Appeals of West Virginia was Columbia Gas of West Virginia, Inc.* (Columbia). The Respondent in that Court was the Public Service Commission of West Virginia (the Commission). There were no other parties before the Supreme Court of Appeals of West Virginia in this matter.

*Petitioner is a subsidiary of The Columbia Gas System, Inc., whose other subsidiaries are Columbia Gas System Service Corporation, Columbia LNG Corporation, Columbia Gas Transmission Corporation, Columbia Alaskan Gas Transmission Corporation, Columbia Coal Gasification Corporation, Columbia Hydrocarbon Corporation, The Inland Gas Company, Inc., Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of New York, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., Columbia Gas of Virginia, Inc., Big Marsh Oil Company, Columbia Gulf Transmission Company, Columbia Gas Development Corporation, Columbia Gas Development of Canada Ltd., Commonwealth Gas Services, Inc., Commonwealth Gas Pipeline Corporation and Commonwealth Propane, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and Statutes

REPORTS OF OPINIONS BELOW

The June 28, 1982 Joint Order of the Commission on Reconsideration in Case No. 80-336-G-30C and Final Order in Case No. 81-366-G-30C (A. 25a) has been reported at 47 PUR 4th 392. The August 25, 1982 Commission Order on Petitions for Reconsideration (A. 132a) has been reported at 48 PUR 4th 558. There have been no other reports, official or unofficial, of any opinions delivered in the court or administrative agency below in the proceedings under consideration in the instant Petition.

JURISDICTION OF THIS COURT

The decision of the Supreme Court of Appeals of West Virginia denying Columbia's Petition for Appeal was entered on November 9, 1982. This Petition for a Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The Constitutional provisions involved in this case, and the page numbers in the Appendix where they are set out verbatim, are the Commerce Clause (A. 142a), the Supremacy Clause (A. 142a), and the Fourteenth Amendment to the United States Constitution (A. 142a). The statutes involved in this case, and the page numbers in the Appendix where they are set out verbatim, are 15 U.S.C §717a(5), at (A. 143a); 15 U.S.C. §717c, at (A. 143a); 28 U.S.C. §1257(3), at (A. 145a); and W. Va. Code §24-2-12 (1980), at (A. 146a).

STATEMENT OF THE CASE

Columbia Gas of West Virginia, Inc. (Columbia), Petitioner herein, sells natural gas at retail in the State of West Virginia. During the natural gas supply emergency of the early 1970's, Columbia's supplier, Columbia Gas Transmission Corporation (Transmission), was experiencing increasing shortfalls in its historic gas supply due to declining volumes available from its Louisiana reserves as well as decreasing deliveries from non-affiliated pipeline suppliers in the southwest. The manufacture and supply of Synthetic Natural Gas (SNG) was one of the many long-range efforts of the Columbia Gas System Companies to develop new gas supplies in order to alleviate the effects of the shortfalls being experienced by Transmission. In 1973, Columbia LNG Corporation (LNG Corporation) entered into contractual agreements with 58 gas distribution companies, only six of which were affiliates of LNG Corporation (including Columbia Gas of West Virginia, Inc.), to manufacture and supply SNG to these companies.

By an Order issued December 10, 1976, the Public Service Commission of West Virginia (Commission) approved

the contract between Columbia and LNG Corporation and gave its consent to Columbia's entering into the contract (A. 1a). The SNG obtained by Columbia and other gas utilities from LNG Corporation was instrumental in easing the difficulties of these utilities in providing adequate gas supplies to meet their customers' needs during the natural gas supply emergency of the 1970's.

The two proceedings before the Commission which gave rise to the judgment of the Supreme Court of Appeals of West Virginia under consideration herein had as their purpose the determination of the gas cost recovery level to be included in Columbia's rates for the periods November 1, 1980 through October 31, 1981 and November 1, 1981 through October 31, 1982, respectively. The two proceedings were commenced with the filing of Purchased Gas Applications with the Commission. The Commission order issued on June 28, 1982, and the August 25, 1982 Commission order affirming it, prohibit Columbia from recovering from its customers approximately $24 million in costs actually incurred in providing SNG to serve its West Virginia customers during the 24-month period ending October 31, 1982. As a result of this disallowance, Columbia's cash position (after Federal Income Tax effect) is permanently reduced by $13 million for the period from November 1980 through October 1982.

The Purchased Gas Application (PGA) covering the period from November 1, 1980 through October 31, 1981 became the subject of Case No. 80-336-G-30C, and the PGA covering the period November 1, 1981 through October 31, 1982 became the subject of Case No. 81-366-G-30C. The Commission issued a Final Order in Case No. 80-336-G-30C on October 30, 1981 (A. 2a). Subsequently, on December 18, 1981, the Commission granted Columbia a rehearing of this case and, for that purpose, consolidated it with Case No. 81-366-G-30C (A. 22a).

Columbia's expenditures for purchased gas in both cases included expenditures for SNG purchased under the 1974 contract.

On June 28, 1982 the Commission issued its Joint Order on Reconsideration in Case No. 80-336-G-30C and Final Order in Case No. 81-366-G-30C. (A 25a) Despite its December 10, 1976 Order, the Commission concluded that Columbia had violated W. Va. Code §24-2-12(f) (1980) by failing to obtain the Commission's approval prior to entering into the SNG contract with LNG Corporation, an affiliated company. The Commission further concluded that the SNG contract adversely affects the public in the State of West Virginia. The Commission repriced for ratemaking purposes the SNG purchased by Columbia during the 24-month period November 1, 1980 through October 31, 1982 to the average price at which Columbia acquired natural gas from its principal supplier, Transmission.

On the basis of its conclusions regarding the current gas acquisition program of Columbia, the Commission instituted four "new standards" which would be applied in Columbia's next purchased gas application proceeding.*

---

*The Commission stated:

In its next purchased gas cost proceeding before this Commission, Columbia shall present evidence to demonstrate its compliance with the following: (a) the use of bids for the purchase of some significant quantity of natural gas supplies needed to fulfill its customer requirements; (b) Columbia's efforts to purchase West Virginia produced natural gas; (c) evidence in support of Columbia's burden to demonstrate that dependable lower-priced supplies of natural gas are not readily available from other sources and that Columbia's contracts with affiliated corporations are not detrimental to Columbia's customers; and (d) efforts which Columbia has taken to more adequately represent the interests of its West Virginia jurisdictional customers in the Columbia Gas System, as opposed to subordinating the interests of its West Virginia service area to those of the Columbia Gas System as a whole, all as set forth previously in this order. (A. 126a).

The Commission flatly declared that Columbia's performance measured against these standards would furnish a basis for the Commission to refuse cost recovery to some increment of Columbia's purchases from Transmission at FERC-approved "just and reasonable" rates under Section 4 of the Natural Gas Act, 15 U.S.C. §717c. (A. 106a).

Columbia petitioned the Commission for reconsideration of its June 28, 1982 Order on July 28, 1982. In that Petition, Columbia raised all five of the constitutional issues contained in this Petition for a Writ of Certiorari. In addition, Columbia appealed to the Supreme Court of Appeals of West Virginia, raising all five issues contained in the instant Petition. The Commission responded to Columbia's Petition for Reconsideration in an Order issued on August 25, 1982. (A. 132a). The Commission made one modification of its June 28, 1982 Order in response to Columbia's argument that the new gas procurement standards articulated by the Commission were offensive to the Commerce Clause of the United States Constitution. The repricing standard, to be applied if Columbia does not demonstrate to the Commission's satisfaction "that dependable lower-priced supplies of natural gas are not readily available from other sources" (A. 104a), was changed from "the reasonable cost of natural gas which is determined to be readily available within the State of West Virginia" (A.104a), to "the reasonable cost of natural gas which is determined to be otherwise readily available" (A. 136a). Apart from this modification, the Commission rejected the Constitutional arguments raised by Columbia, denied its Petition for Reconsideration and affirmed (with the single modification noted) its Order of June 28, 1982.

Columbia again raised all five of the Constitutional

issues contained in this Petition for a Writ of Certiorari on September 24, 1982, in a Petition for Appeal which it presented to the Supreme Court of Appeals of West Virginia. On November 9, 1982, the Supreme Court of Appeals refused to hear the appeals then pending in that Court (A 138a, and A. 140a).

REASONS FOR ALLOWANCE OF THE WRIT

I. WEST VIRGINIA HAS ENGAGED IN COMMERCIAL PROTECTIONISM IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Public Service Commission of West Virginia (Commission) has committed two acts repugnant to the Commerce Clause of the United States Constitution. Columbia Gas of West Virginia, Inc. (Columbia) raised its objection to both these acts before the Supreme Court of Appeals of West Virginia in its Consolidated Petition for Appeal of the Commission's Orders of June 28, 1982 and August 25, 1982. The Supreme Court of Appeals denied Columbia's Petition for Appeal.

First, the Commission interpreted W. Va. Code§24-2-12(f) (1980)as requiring prior Commission approval of a transaction *in interstate commerce* entered into between Columbia and an affiliated company, Columbia LNG Corporation (LNG Corporation). Then, the Commission found that this transaction, a ten-year contract for the supply and purchase of SNG, adversely affects the public in the State of West Virginia. Having made this finding, the Commission partially voided the SNG contract and repriced, for ratemaking purposes, gas purchased by Columbia under the contract to the average price level of the natural gas Columbia acquired from its principal supplier, Columbia Gas Transmission Corporation (Transmission).

Second, the Commission has enunciated new standards by which Columbia's practices of acquiring natural gas will be examined in future regulatory proceedings.[1] One of these standards is that Columbia "should make a substantial effort to purchase West Virginia produced natural gas, making much the same commitment as has been made by Hope Natural Gas Company . . . ."(A. 104a). Another standard places on Columbia " the burden of demonstrating that dependable lower-priced supplies of natural gas are not readily available from other sources . . . ." *Id.* In elaboration of this standard, the Commission threatened in its June 28, 1982 Order that it might reprice gas acquired by Columbia "to the reasonable cost of natural gas which is determined to be readily available within the State of West Virginia." *Id.* The Commission's Order of August 25, 1982 modified this language, removing the specific reference to West Virginia and threatening to reprice to the level of gas "otherwise readily available." The modification, however, fails to achieve the Commission's expressed intention of "insur[ing] that the standards . . . do not impose a burden on interstate commerce . . ." (A. 136a).

These two acts of the Commission fly in the face of the Commerce Clause and past decisions of this Court and lower federal courts. The contract between Columbia and

---

[1] It appears that the standards may be applied, however, to any of Columbia's practices which are examined in such future proceedings, not merely those which have occurred subsequent to the Commission's enunciation of the new standards. Thus, in addition to the substance of some of the new standards violating the Commerce Clause, the application of these standards to Columbia's conduct without prior notice violates the Due Process Clause of the Fourteenth Amendment. This same due process defect is discussed with regard to the Commission's SNG repricing standard in the Fourth Reason for Granting the Writ, beginning at page 21 of this petition.

LNG Corporation is unquestionably a transaction in interstate commerce. By asserting the right to approve or disapprove it, the Commission arrogates to itself the power of interfering directly with such commerce. States have no authority to prescribe the rates or prices to be charged for utility commodities transferred in interstate commerce or to prevent utilities from fulfilling their contractual obligations in interstate commerce. *Kansas Corporation Comm. v. Wichita Gas Co.*, 290 U.S. 561 (1934); *Tri-State Generation & Transmission Ass'n., Inc. v. Public Service Commission of Wyoming*, 412 F. 2d 115 (10th Cir. 1969), *cert. denied*, 397 U.S. 1043 (1970).

The new gas procurement standards announced by the Commission seek specifically to put West Virginia gas in a favored position vis-a-vis gas produced in other states and transported in interstate commerce. One standard would have Columbia make a "commitment" to purchase West Virginia gas. Even with the modification of language made by the Commission's Order of August 25, 1982, the repricing standard can still be used to favor local gas by prohibiting a utility from recovering any amount by which the cost of non-local gas exceeds that of local gas. These standards are obvious manifestations of parochialism. They would protect a set of supposed local interests at the expense of a national common market in gas. They are incompatible with the recent decisions of this Court. *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333 (1977); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

If this Court fails to prohibit the State of West Virginia, through its Public Service Commission and Supreme Court of Appeals, from deciding for itself how much interstate trade it will permit within its boundaries and what barriers it will raise to protect its indigenous population and industries, other states may not wait long

before responding in kind. For the sake of the constitutional goal of unencumbered national trade, such commercial protectionism must be struck down.

II. WEST VIRGINIA HAS DENIED COLUMBIA RECOVERY OF FERC-APPROVED TRANSPORTATION CHARGES, AND HAS INSTITUTED STANDARDS FOR DISREGARDING FERC-APPROVED WHOLESALE RATES, THEREBY ENCROACHING UPON THE FERC'S JURISDICTION UNDER THE NATURAL GAS ACT IN VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

In addition to repricing SNG to the average commodity rate charged for natural gas by Columbia's principal supplier, the Commission denied Columbia recovery of the transportation charges it paid on SNG purchased during the period November 1, 1980 through October 31, 1982 (A. 82a). These charges are charges for the transportation of mixtures of natural and artificial gas; they were approved by the FERC, which has exclusive authority to set such charges. 15 U.S.C §§717a(5) and 717c. Columbia informed the Supreme Court of Appeals of West Virginia that the Commission's rejection of the FERC-approved transportation charges amounted to a violation of the Supremacy Clause of the United States Constitution. The Supreme Court of Appeals denied Columbia's Petition for Appeal.

Just as clearly, the Natural Gas Act commits the matter of sale for resale of natural gas in interstate commerce to the FERC, by virtue of §§717a(5) and 717c of the Natural Gas Act. The repricing "standards" adopted by the Commission for prospective application to Columbia's wholesale purchases from Transmission at "just and reasonable" wholesale rates established by the FERC

constitute an ongoing violation of the Supremacy Clause of the United States Constitution. The standards impose a chilling effect on Columbia's wholesale purchases of gas in interstate commerce.

In enacting the Natural Gas Act, Congress indicated its intention to bring under exclusive federal jurisdiction the regulation of interstate commerce in natural gas. The Federal Power Commission and, subsequently, the Federal Energy Regulatory Commission, were given sole authority to inquire into and establish reasonable rates and charges with respect to such commerce. 15 U.S.C. §717c. The FERC has established the transportation charge for mixtures of natural and synthetic gas which Columbia incurred and the Commission has denied in this case. The Commission's denial constitutes a challenging of a rate validly established by the FERC in the exercise of its exclusive jurisdiction and, therefore, an assertion of state power in an area which has been preempted by the federal government.

This Court has not ruled on the precise issue of a state regulatory agency's refusal to recognize as a reasonable operating expense an expense for gas purchased or transported in interstate commerce at a FERC-approved rate. A number of state supreme courts, however, have considered this issue in the context of wholesale rates and have concluded that the Natural Gas Act preempts any such power. *Citizens Gas Users Ass'n v. Public Utilities Commission of Ohio,* 165 Ohio St. 536, 138 N.E.2d 383 (1956); *United Gas Co. v. Mississippi Public Service Commission,* 240 Miss. 405, 127 S.2d 404 (1961); *Narragansett Electric Co. v. Burke,* 381 A.2d 1358 (R.I. 1977); *Northern States Power Co. v. Hagen,* 314 N.W.2d 32 (N.D. 1981).

Although SNG itself is not a commodity the sale and transportation of which is regulated by the FERC, SNG

mixed with natural gas is subject to the interstate transportation rate established by the FERC. The FERC is the only forum in which the reasonableness of that rate may be reviewed. To permit state commissions to second-guess the FERC and recognize only a part of the FERC transportation rate as a reasonable expense of a public utility would bring conflict and chaos to an area which Congress has reserved for the consistency and uniformity of federal regulation. The Supremacy Clause requires that this aim of Congress not be defeated by the encroachment of individual states.

The repricing standards announced by the Commission in the June 28, 1982 order are similarly incompatible with the exercise by the FERC of its exclusive jurisdiction to determine "just and reasonable" wholesale rates. Any repricing of natural gas purchased for resale in interstate commerce by a State regulatory commission amounts to a hindsight judgment by that state commission that the FERC had failed to establish a "just and reasonable" wholesale rate. In fact, the wholesale rate established by the FERC is the *only* reasonable rate for purchases of natural gas from Transmission which Columbia can claim as appropriate. *Montana-Dakota Utility Co. v. Northwestern Public Service Company*, 341 U.S. 246, 251-252 (1951). The repricing standards would disrupt the comprehensive national scheme of regulation of natural gas sales for resale in interstate commerce. The Supremacy Clause requires that this state encroachment be repelled.

III. WEST VIRGINIA HAS REPRICED SYNTHETIC NATURAL GAS PURCHASED BY COLUMBIA IN ACCORDANCE WITH STANDARDS UNARTICULATED AT THE TIME OF SUCH PURCHASES, THUS DEPRIVING COLUMBIA OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In its Order of June 28, 1982 the Public Service Commission of West Virginia ruled that Columbia could not recover in rates any of the amounts it expended on SNG in the 24-month period ended October 31, 1982 in excess of the price Columbia's principal supplier would have charged for like quantities of natural gas. This repricing of SNG by the Commission denies Columbia recovery of a staggering $24 million of the $52 million which it spent on SNG during that period.

The basis of the Commission's repricing decision was its conclusion that Columbia's SNG contract adversely affected the public in the State of West Virginia and should, therefore, be considered void under W. Va. Code §24-2-12 (1980) to the extent that the public was adversely affected.

Columbia submitted its SNG contract to the Commission, at the Commission's request, in 1976. At that time the Commission determined that the terms and conditions of the contract were reasonable, that no party was given an undue advantage over another, and that the public was not adversely affected. The Commission then authorized Columbia to enter into the contract (A. 1a). On June 28, 1982, however, the Commission decided that the public now was adversely affected and that Columbia should, therefore, be penalized some $24 million. Columbia argued to the Supreme Court of Appeals of West Virginia that the Commission's repricing of SNG without any prior articulation of standards (the violation of which would necessitate such repricing) would deprive it of property without due

process of law. The Supreme Court of Appeals denied Columbia's Petition for Appeal.

This Court has made it clear that a state regulatory agency must posit "criteria more discriminating than justice and arbitrariness" in its ratemaking decisions. *Permian Basin Area Rate Cases,* 390 U.S. 747, 790 (1968). This articulation of criteria is necessary for two reasons: first, it provides the utility regulated by the agency with notice of the standards by which it will be judged; second, it provides the court reviewing the agency's decisions with the self-expressed standards on which the agency acted, a prerequisite to the court's discharging its duty of judicial review.

Columbia in this case was denied the benefit of any prior articulation of standards. It knew only that in 1976 the Commission had examined its SNG contract and found it to be unexceptionable. It had no notion that the Commission could attempt years later, as it has done, to repudiate its approval of that contract—which was a ten-year contract when the Commission bestowed its blessing on it and is a ten-year contract still. Even if Columbia had known that the Commission would, or even could, retract its imprimatur at this late date, it had no way of predicting the standards by which a rejudging of the contract would be made.

Columbia's inability to divine the standards which the Commission had failed to state has resulted in the effective confiscation of $24 million expended in good faith by Columbia to provide its customers with needed supplies of gas. This deprivation of property without notice of standards by the Commission is inimical to the concepts of fundamental fairness and justice contained in the Fourteenth Amendment's guarantee of due process.

The Commission's standard for finding Columbia's SNG contract unreasonable was also a new standard of which Columbia had no notice until the Commission imposed the repricing standard which was affirmed in its June 28, 1982 Order. Due process requires that Columbia not be deprived of its property on the basis of a standard of which it did not and could not have had any knowledge.

IV. WEST VIRGINIA'S ACTION RESULTED IN A RATE OF RETURN TO COLUMBIA ON ITS INVESTMENT THAT IS ADMITTEDLY INADEQUATE, IN CONTRAVENTION OF THE CONSTITUTIONAL STANDARDS ENUNCIATED IN THE *HOPE, BLUEFIELD* AND *PERMIAN BASIN* DECISIONS OF THIS COURT AND THE *VIRGINIA ELECTRIC* DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, WHICH RESULTS IN A CONFISCATION OF COLUMBIA'S ASSETS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Virginia Electric and Power Co. v. Public Service Commission*, ___ W. Va. ___, 242 S.E.2d 698 (1978), the Supreme Court of Appeals of West Virginia enunciated the following criteria for the end result that must follow any methods of determining rates that the Commission adopts:

> The Public Service Commission may employ such methods for determining utility rates as it deems suitable, so long as the end result guarantees West Virginia good service at fair rates and enables utilities to earn a competitive return for their stockholders upon their investment in West Virginia.

(Syllabus, 242 S.E.2d at 699)

In its June 28, 1982 Order, the Commission endorses an earlier discussion of its duties consistent with holdings of this Court in *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591 (1944), and *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), as to the maintenance of financial integrity of jurisdictional utilities A. 68a). The Commission also states that its SNG repricing decision will undoubtedly result in a reduction of Columbia's achieved rate of return (A 67a) and that the disallowance may result in "the utility's earning an otherwise inadequate rate of return" (A. 69a). In Conclusions of Law 22 through 25, the Commission held that the *Hope* and *Permian Basin* general standards are not applicable in the instant case. (A. 120a).

The Commission's Orders omit any reference to another landmark decision of this Court in *Bluefield Water Works and Improvement Company v. Public Service Commission,* 262 U.S. 679 (1923), where the Court stated:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

262 U.S. at 690. This Court illustrated the interest of the utility in the adequacy of its return as follows:

> The return should be reasonably sufficient to assure confidence in the financial soundness of

> the utility and should be adequate, under efficient and economic management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

262 U.S. at 693.

The major premise of the SNG repricing decision in these cases may be restated as follows: Because Columbia entered a gas supply contract in 1973, under which, from November 1980 through October 1982, purchases were made at a "high" price when "lower" priced alternative supplies might have been purchased in the absence of the contractual obligation, the contract price paid was unjust and unreasonable, and the Commission need not concern itself with the inadequacy of Columbia's return as a result of voiding the contract for ratemaking purposes, since "financial integrity for ratemaking purposes" can ignore the impact of disallowed operating expenses (A. 120a). The *Hope, Bluefield,* and *Permian Basin* decisions of this Court provide no support for this view. In fact, the excerpt from *Permian Basin* set forth in the June 28, 1982 Final Order (A. 68a) is misleading concerning the standard of review of a rate order properly to be applied, in that the following critically important statement was omitted:

> *The Court's responsibility is* not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead

> *to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.* (emphasis added)

390 U.S. at 792.

The Orders' discussion relating to inadequacy of return compels the conclusion that "reasoned consideration" has not been given either to Columbia's contractual obligation to purchase SNG, or to Columbia's financial integrity, its ability to attract necessary capital and fairly compensate investors for risks they have assumed. The penalty levied on Columbia has not only been wrongfully and unlawfully imposed, but it has also been imposed with the Commission's frank admission that it deems it unnecessary even to consider the resulting inadequate return. This Court must invalidate the Commission's warped interpretation of the controlling cases and reaffirm the concept that a utility may not be compelled to serve for a demonstrably inadequate return. Such compulsion amounts to confiscation in violation of the Fourteenth Amendment to the United States Constituton.

V. WEST VIRGINIA HAS DENIED COLUMBIA THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE OTHER GAS UTILITIES IN WEST VIRGINIA WHICH ARE SNG CUSTOMERS, INVOLVED IN A BUSINESS SUBSTANTIALLY SIMILAR TO THAT OF COLUMBIA, ARE TREATED DIFFERENTLY FROM COLUMBIA.

There are four other gas companies in West Virginia (Bluefield Gas, Shenandoah Gas, Blacksville Gas and Cameron Gas Companies) which are SNG customers and

whose business is substantially similar to that of Columbia[7], except that Columbia has considerably larger sales volumes than these other four companies.[8] Despite the substantial similarities among these gas utilities, the Commission approved full cost recovery for the SNG purchases of the other four gas utilities and singled Columbia out for cost disallowance.

In striking down legislation which could be applied to but one company, this Court has stated:

> . . . if once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost . . .

---

[7] For example, the percentage of SNG in total gas supplies of Shenandoah, Bluefield, and Columbia are approximately the same. Moreover, for Shenandoah and Bluefield, as for Columbia, the per unit cost of SNG is higher than the per unit cost of the gas supplied each of them by Transmission. A Commission Staff witness testified at the hearing that the impact of the cost of SNG purchased by Shenandoah and Bluefield upon their customers is "approximately the same" as the impact of the cost of Columbia's SNG purchases upon its customers.

[8] The Commission attempted to rationalize its different treatment of Columbia on the basis of Columbia's size and its greater sales volumes (A. 75a). While it has been held that distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved, such distinctions cannot be so justified if the discrimination has no reasonable relationship to the difference. *Morey v. Doud*, 354 U.S. 457, 466 (1957). Where the size of the entity is not "an index to an admitted evil," the Equal Protection Clause of the United States Constitution will not permit discrimination between the "great and the small." *Engel v. O'Malley*, 219 U.S. 128, 138 (1911).

> this statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would . . .

Cotting v. Kansas City Stockyards Company, 183 U.S. 79 at 112 (1901). In like manner, the singling out of Columbia on the basis of the volume of gas it delivered and sold to West Virginia jurisdictional customers, without any distinction relative to the quality or value of service rendered by Columbia and other SNG purchasers, patently denies Columbia the equal protection of the law.

While it is true that Bluefield, Shenandoah, Blacksville, and Cameron are not affiliates of LNG Corporation, whereas Columbia is an affiliate, this affiliation provides no lawful basis for the discriminatory treatment of Columbia vis-a-vis the other SNG purchasers. First, 52 non-affiliated distribution companies have SNG purchase agreements with LNG Corporation on terms and conditions identical, except for contract volumes, to those in Columbia's SNG purchase agreement.[4] Second, the Commission's action on December 10, 1976 in approving the SNG contract eliminated any basis for the distinction which the Commission has made. As the Maryland Public Service

[4] Fourteen of Columbia Transmission's 75 wholesale customers declined to enter into SNG purchase agreements with Columbia LNG. One of those customers which did not enter into an SNG purchase agreement was Columbia Gas of Virginia, Inc.—one of Columbia's affiliates.

Commission observed in response to the Maryland People's Counsel argument that the cost of SNG should not be included in the purchased gas adjustment calculation of Columbia Gas of Maryland, Inc., because of its affiliation with Columbia LNG:

> With respect to People's Counsel's contention that Greensprings (sic; Green Springs) SNG charges should be excluded from Columbia Gas' PGA charges, the hearing Examiner properly concluded that under the circumstances, this unregulated affiliate transaction could be reflected in the PGA computation. *Since the provisions of the contract with each distribution company (affiliates and non-affiliates alike) are identical, Columbia Gas' contract for gas is, in effect, the result of an independent arms-length transaction. We agree with the Hearing Examiner that to remove the SNG charges from Columbia Gas' SNG (sic; PGA) computation would be arbitrary.*

In the matter of Purchased Gas Adjustment Costs Charged to Customers by Gas Utility Companies, Case No. 6865, Order No. 64435, September 15, 1980, p. 8. (emphasis added)

In summary, there is no reason for the Commission to have treated Columbia differently from the other four West Virginia gas utilities with respect to cost recovery for purchased SNG volumes, and to do so was a denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The SNG repricing, and the adoption of new standards by the West Virginia Public Service Commission fly in the face of the Commerce Clause, the Supremacy Clause and the Fourteenth Amendment to the United States Constitution. Moreover, the issues raised have farreaching implications for the natural gas industry. Therefore, your Petitioner respectfully prays for the issuance of a Writ of Certiorari to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

THOMAS E. MORGAN
ALLAN E. ROTH
ANDREW J. SONDERMAN
99 N. Front Street
P.O. Box 117
Columbus, Ohio 43216-0117
(614) 460-2549

CHARLES R. MCELWEE
WILLIAM C. PORTH, JR.
LOVE, WISE, ROBINSON & WOODROE
Charleston National Plaza
P.O. Box 951
Charleston, West Virginia 25323
(304) 343-4841

Attorneys for Petitioner

No.__________

In The

Supreme Court of the United States

October Term, 1982

COLUMBIA GAS OF WEST VIRGINIA, INC.,
Petitioner

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Respondent

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

TABLE OF CONTENTS TO APPENDIX

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 8817

**COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.**
Petition for approval of Sales Agreement with Columbia LNG Corporation and Service Agreement with Columbia Gas Transmission Corporation.

**ORDER
(Entered December 10, 1976)**

WHEREAS, on August 10, 1976, Columbia Gas of West Virginia, Inc., a corporation ("Columbia"), filed its petition, duly verified, pursuant to West Virginia Code 24-2-12(f), Rule 11(i) of the Commission's Rules of Practice and Procedure and Ordering Paragraph 8 of the Commission's June 16, 1976 order in Case No. 8000, for the Commission's consent and approval of a certain Sales Agreement between Columbia and Columbia LNG Corporation, an affiliate, and a certain Service Agreement between Columbia and Columbia Gas Transmission Corporation, an affiliate;

IT IS, THEREFORE, ORDERED that the Commission should, and hereby does, grant its consent to the entering into the aforesaid Sales Agreement and Service Agreement by Columbia, without approving the terms and conditions thereof; provided however, that such consent shall not be deemed to bind the Commision in any ratemaking proceeding involving Columbia.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 30th day of October, 1981.
CASE NO. 80-336-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC., a corporation.
Application to change rates, effective November 1, 1980, according to Rule 30-C, General Order No. 183.4, Purchased Gas Application.

APPEARANCES: Charles R. McElwee, Andrew J. Sonderman and Thomas E. Morgan on behalf of Columbia Gas of West Virginia, Inc.; Lee Feinberg on behalf of Weirton Steel Division of National Steel Corporation, Intervenor; and Richard Hitt and Angela Demerle Williams of the Legal Division for Commission Staff.

FINAL ORDER

On August 1, 1980, Columbia Gas of West Virginia, Inc. (Columbia), a corporation, filed an application with the Commission to change rates for gas service in compliance with the Commission's General Order No. 183.4, issued on June 26, 1979.

By order entered August 27, 1980, this matter was set for hearing to be held in the Commission's Hearing Room at the Capitol in the City of Charleston on the 7th day of October, 1980, at which time and place the parties were to address the issues in this case, including: (1) the need for SNG based upon the most recent gas supply-demand data; and (2) considering recent communications from Columbia

to the Commission, the extent to which SNG and LNG can be replaced by other supplies of gas. Columbia was also ordered to present detailed evidence relating to the reasonableness of its proposed purchased gas costs in general.

The hearing was held as scheduled on October 7, 1980, and continued through October 8, 1980. At the close of hearing on October 8, the Commission set this matter for oral argument to be held on October 23, 1980, and established the following briefing schedule: simultaneous initial briefs to be filed on or before October 20, 1980, at 5:00 p.m., and simultaneous reply briefs to be filed on or before October 22, 1980, at 5:00 p.m.

The hearing was held as scheduled on October 23, 1980, and continued on October 24 and 28, 1980. During this phase of hearings, Commission Staff recommended that the Commission abrogate the contract between Columbia and Columbia LNG Corporation (CLNG), which issue, as well as certain subsidiary issues, the Commission set for further briefing according to the following schedule: simultaneous initial briefs to be filed on or before November 7, 1980, at 5:00 p.m. and simultaneous reply briefs to be filed on or before November 12, 1980, at 5:00 p.m.

On October 31, 1980, the Commission entered an Interim Order in this case, approving an interim purchased gas cost for Columbia to be effective for all gas supplied on and after November 1, 1980, subject to modification as a result of any subsequent decision regarding the cost of SNG and its inclusion in Columbia's cost of purchased gas.

DISCUSSION

The primary questions facing the Commission with regard to the issue of the inclusion or exclusion of SNG

costs from the cost of Columbia's purchased gas are as follows: (1) Does this Commission have the authority to disregard the contract between Columbia and CLNG for ratemaking purposes and disallow a portion of the cost of SNG to be included in Columbia's rates; and (2) If it is determined that the Commission has such authority, should that authority be exercised in this case?

W.Va Code §24-2-12 (1980 Replacement Volume) states, in part, that:

> *Unless the consent and approval of the public service commission of West Virginia is first obtained . . .* (f) *no public utility subject to the provisions of this chapter, may, by any means, direct or indirect, enter into any contract or arrangement for* management, construction, engineering, *supply*, or financial services *or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.*
>
> Every assignment, transfer, lease, sale, or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof and *every contract*, purchase of stock, arrangement or other transaction *referred to in this section made otherwise than as hereinbefore provided shall be void to the extent that the interests of the public in this State are adversely affected*, but this shall not be construed to relieve any utility from any duty required by this section. (emphasis added).

W.Va. Code §24-2-12 confers upon this Commission sufficient authority to regulate, modify or disapprove any contract with an affiliated company, which is entered into by a public utility subject to the jurisdiction of this Commission. As the statute requires, unless Columbia comes

before this Commission, prior to entering into such a contract, and obtains either Commission approval or an exemption from this section, any contract entered into by Columbia with an affiliated company shall be void insofar as it adversely affects the interests of this State. This Commission has previously stated that such a contract entered into by a public utility is voidable, subject to an investigation to determine if the public interest is adversely affected by the contract *(Wesco Equipment, Inc. v. Clinton Water Association, et al,* Case No. 9682, Commission's Order on Exceptions, March 24, 1980, at pages 5-6). By the plain language of the statute in question, any contract entered into in violation of its provisions must, indeed, be voidable for ratemaking purposes.[1]

---

[1] In holding that a contract entered into by a public utility, subject to the Commission's jurisdiction, in violation of W.Va. Code §24-2-12, is voidable, we recognize that we are reaching a decision contrary to the decision of the Supreme Court of Appeals of West Virginia on the same issue. *See , Lockard v. Salem,* 127 W.Va. 237, 32 S.E. 2d 568 (1944). In the *Lockard* case, the Court stated that a contract entered into by a public utility subject to the Commission's jurisdiction, without the *prior* approval of the Commission, was void, not *voidable.* The Court further stated that, in so holding, it was, nevertheless giving effect to the words "shall be void to the extent that the interests of the public in this state are adversely affected", in that, if, in the first instance, the Commission found that a contract did not adversely affect the interests of the public, when, in fact, it did, that finding is erroneous and may be corrected upon application to the Court. *Lockard,* 127 W.Va. at pages 245-246. In the *Lockard* case, the dissenting opinion, filed by Judge Lovins, expresses the position which the Commission takes in this order and which the Commission is convinced would be the position taken by the Court today: namely, that if a contract is entered into by a utility company in violation of this statute, it is voidable, and, if it is subsequently determined that the interests of this State are adversely impaired by said contract, it is then rendered void. Otherwise, the contract remains in full force and effect. *See, Lockard,* Dissenting Opinion 127 W.Va. at pages 217-249.

Any other interpretation of W.Va. Code §24-2-12 is absolutely untenable in this day and age when emergencies can occur rapidly,

The Synthetic Gas Purchase and Sales agreement between Columbia LNG Corporation and Columbia Gas of West Virginia, Inc., was entered into on July 26, 1973 (J. R. Lee Ex. 1). On June 16, 1976, in Case No. 8000, the commission ordered Columbia to comply with W.Va. Code §24-2-12 by seeking the consent and approval of the Commission for its arrangement for the sale, purchase and exchange of gas produced at the reforming plant located at Green Springs, Ohio, with its affiliates, Columbia Gas Transmission Company (CGTC) and CLNG. 63 ARPSCWV 559 at 593 (1976). In that case, the Commisssion further determined that it had the authority to adjust the actual costs incurred by Columbia associated with SNG and made certain adjustments to Columbia's cost of service before including the adjusted cost of SNG in Columbia's cost of service for ratemaking purposes. On December 10, 1976 in Case No. 8817, the Commission granted its consent to the entering into of the aforesaid sales agreement and service agreement by Columbia, without approving the terms and conditions thereof as authorized in W.Va. Code §24-2-12 and provided that such consent would not be deemed to bind the Commission in any ratemaking proceeding involving Columbia. 64 ARPSCWV 1029 (1976).

Thus, statutory authority and the language of the Commission order permitting Columbia to enter into the contract with CLNG clearly demonstrate that this Commission has the authority to disregard the contract between Columbia and CLNG for ratemaking purposes.

---

and the supply of a public utility's commodity to its customers can be immediately threatened. In a true emergency, there may not be adequate time for a company to come before the Commission and make application for approval of a contract needed to insure an adequate supply of its commodity to its customers. To hold such a contract void *per se*, without regard to the necessity or benefit of the contract is patently unreasonable and could lead to the deterioration of public utility service in this State.

Even though the Commission subsequently gave its permission for Columbia to enter into the contract, it did so without approving the terms and conditions of the contract, which type of approval is expressly authorized by W.Va. Code §24-2-12, and it did so with the proviso that the approval would not bind it in subsequent cases for ratemaking purposes.

> Though as a general rule public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties, *the principle is firmly established that all contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the state of its regulatory power whenever the public interest may make it necessary; and when such contracts are the subject of statutory regulation, no contract for service may be made by a public utility except as provided by law,* although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority. 145 W.Va. at 129 (emphasis added). *Preston County Light and Power Company v. Renick, et al.*, 145 W.Va. 115, 113 S.E. 2d 378 (1960).

The SNG contract must be deemed to have been entered into in contemplation of the exercise by the State of its regulatory power whenever the public interest requires it. As a result, this Commission does have the authority to disregard the SNG contract for ratemaking purposes and to disallow part or all of the SNG costs if we determine that they are unreasonable. Indeed, the Commission has the authority and responsiblity to determine on an annual basis whether the contract adversely affects

the interests of the State and thereby continually adjust the portion of SNG costs which Columbia may recover in its rates for the duration of the contract. See. e.g., *Columbia Gas of West Virginia, Inc.*, Case No. 8000, 63 ARPSCWV 559 (1976); Case No. 8807, 64 ARPSCWV 990 (1977); Case No. 9147, ____ARPSCWV____ (1978); Case No. 79-088, ____ARPSCWV____ (July 17, 1980).

The determination that the Commission has the authority to disregard the contract between Columbia and CLNG brings us to the remaining issue for decision in this case: Should the Commission exercise its authority to disregard the SNG contract in this case and disallow the recovery of part or all of the SNG cost? As we shall subsequently explain, we are of the opinion that the Commission should exercise its authority to disregard the SNG contract in this case.

The Staff argument in this case is that it is unreasonable to include $4.79 per Mcf for SNG in Columbia's cost of purchased gas when it does not need that gas to supply its customers. We are in agreement with this position and thus will take steps in this case to allow the SNG to be included in Columbia's purchased gas adjustment only at the average rate Columbia pays its pipeline supplier, CGTC, rather than at the full $4.79 per Mcf established in the contract between Columbia and CLNG.

We have reached this decision for the primary reason that the evidence adduced at the hearings in this case established that the SNG is not needed to serve Columbia's West Virginia customers. We recognize that we have, up until the present, allowed Columbia to recover substantially all the costs associated with its SNG contract with CLNG, even though Columbia failed to obtain the Commission's approval of the SNG contract prior to its execution, in violation of W.Va. Code §24-2-12. We have allowed such recovery because there has not heretofore

been a showing (as there is here) that Columbia did not need the SNG because sufficient volumes of natural gas were available to meet Columbia's West Virginia needs.

In analyzing the question of the need for SNG, two items must be considered—the demand requirements of Columbia's customers and the available supply from CGTC. Information presented by CGTC in response to Commission Staff data requests demonstrated that, for contract year 1980 (November 1980—October 1981), CGTC could meet all of the needs of its distribution company customers, 1,541.6 Bcf (73.3 Bcf of which would go to Columbia, including 5 Bcf of SNG), and still retain a 78.1 Bcf surplus of gas supply (Col. Ex. 2 "Gas Requirements and Gas Available" [The Blue Book], 1981 contract year total; Staff Data Request Ex. No. 1).

As a result of this surplus, CGTC could meet the entire requirements of its customers for the period November 1980—October 1981 even if the SNG supplies of 75.6 Bcf were completely eliminated from CGTC's calculations, and still retain a 2.5 Bcf surplus. In addition, CGTC presented data indicating that, for the period November 1980 through March 1981, actual requirements could underrun the previously estimated requirements by as much as 43 to 44 Bcf (Col. Ex. 2, Response to Staff Data Request No. 4). It is clear that CGTC could meet its distribution companies' requirements without the SNG.

The final step is to determine if the SNG is needed by Columbia to serve its West Virginia customers. As noted previously, CGTC could supply Columbia with 73.3 Bcf, 5 Bcf of which represented SNG. In Columbia's original filing in this case, it estimated requirements for November 1980—October 1981 as 62.2 Bcf (Columbia Ex. 1, Schedule No. 6). On October 7, 1980, it revised that figure to 67.8 Bcf, to reflect estimated increased requirements of Weirton Steel Division of National Steel Corporation (Weirton)

(Columbia Ex. 1, Revised and Substituted Schedule No. 6; Tr. Vol. I, pp. 15 and 32). Later that same day, Columbia further increased that figure to 70.8 Bcf to reflect further estimated increased requirements of Weirton (Amended, Revised and Substituted Schedule No. 6; Tr. Vol. I, pp. 23 and 33) Comparing the highest of the requirement figures presented by Columbia to the supply available from CGTC, excluding the SNG, represents, approximately, a 2.5 Bcf shortfall for Columbia. However, that doesn't take into consideration CGTC's 78.1 Bcf surplus or the extra gas available as a result of the 43-44 Bcf underrun of CGTC's requirements to its supply. Comparing the CGTC supply figure to either of the other requirement figures presented by Columbia demonstrates between a .5 Bcf surplus to a 6.1 Bcf surplus. The evidence unequivocally shows that, for the year November 1980—October 1981, CGTC could supply Columbia with more than enough gas to meet its requirements, without SNG.

Thus, it would be reasonable for this Commission to exclude the excess cost of SNG from Columbia's purchased gas costs. However, we will include the SNG in Columbia's purchased gas costs, repriced to the average projected CGTC rate of approximately $2.68 per Mcf (developed on Appendix A). This action will eliminate an unjust burden on Columbia's ratepayers.

As we have continually stated, we will review SNG costs on an annual basis to determine the reasonableness of the particular year's proposed SNG recovery. In years such as November 1980—October 1981, when SNG is clearly not needed to serve West Virginia customers and when cheaper gas is being turned back, it is unreasonable to require West Virginia's ratepayers to pay the contract price on that SNG. West Virginia ratepayers are obligated to pay and West Virginia utilities are authorized to collect rates that are just and reasonable, but not more than just and reasonable. To require West Virginia ratepayers to pay

rates that include SNG at approximately $4.79 per Mcf when that SNG is not needed to serve them and when conventional supplies of gas priced at approximately $2.68 per Mcf are being turned back, would be to require the ratepayers to pay rates far in excess of just and reasonable rates.

Since our decision will undoubtedly result in a reduction of Columbia's achieved rate of return, we are of the opinion that we should discuss our decision in light of the *Hope* [2] and the *Permian Basin* [3] standards for determining whether a Commission decision provides a company with an adequate rate of return.

---

[2] *Federal Power Commission v. Hope Natural Gas Company* 320 U.S. 591 (1944). In this case, at page 603, the United States Supreme Court enunciated the following standard:

> The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus, we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. (Citations omitted)

[3] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). In that case, the United States Supreme Court adopted the following standard for review of rate orders:

> It follows that the responsibilities of a reviewing court are essentially three. First, it must determine whether the Commission's order, viewed in light of the relevant facts of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has

We are firmly convinced that these two landmark decisions operate as the most reasonable standards for review of rate determinations under normal circumstances. However, they are inadequate in a situation such as the one facing the Commission in this case. These standards should not and must not be used as mechanisms which allow companies to avoid the consequences of their own unreasonable actions. Reason dictates that a company must not be permitted to take an action that violates state or federal law and which also results ultimately in the incurrence of unreasonable and unnecessary expenses and then to come before this Commission or a reviewing court, hiding behind the veil of inadequate rate of return and thus avoid the responsibility for those actions. Indeed, the United States Supreme Court, in the *Hope* case, recognized that there would be situations where a company was entitled to more or less than the just rate of return, although the Court did not address the issue substantively (see *Hope* 320 U.S. at page 603). We believe the *Hope* and *Permian Basin* tests, in conjunction with our statutory mandate to ensure fair and prompt regulation of public utilities in the interest of the using and consuming public,[4] to appraise and balance the interests of the utilities[5] and to ensure that rates are just and reasonable,[6] not only permit but also require that unjust and unreasonable expenses be disallowed even if such disallowance results in the utility's earning an otherwise inadequate rate of return.

Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, *the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed and yet provide appropriate protection to the relevant public interests, both existing and foreseeable.* (emphasis added).

[4] W. Va. Code §24-1-1(a) (1).

[5] W. Va. Code §24-1-1(b).

[6] W. Va. Code §24-1-1(a)(4).

In the *Permian Basin* cases, the United States Supreme Court recognized that regulatory bodies are not limited to the consideration of only one standard, saying:

> Ratemaking agenies (sic) are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates "to make the pragmatic adjustments which may be called for by particular circumstances." (*Permian Basin* 390 U.S. at pages 776—777).

FINDINGS OF FACT

1. The cost of SNG at the tailgate of the Green Springs, Ohio reforming plant of CLNG as of September 1, 1980 was $4.79 per Mcf, while the 1980—1981 Columbia Gas Transmission Corporation's projected average rate to Columbia Gas of West Virginia for conventional supplies of gas was $2.6868 per Mcf (CEM Ex. A, pp.2—3; Appendix A).

2. Columbia Gas Transmission Corporation could meet all of the needs of its distribution company customers (including 73.3 Bcf to Columbia Gas of West Virginia, Inc.) and still retain a gas supply surplus of 78.1 Bcf (Staff Data Request Ex. No. 1).

3. Even if SNG was completely eliminated from Columbia Gas Transmission Corporation's available supply, CGTC could supply all of its customers' requirements and still retain a 2.5 Bcf surplus of gas (Staff Data Request Ex. 1).

4. Columbia Gas Transmission Corporation's customer requirements are estimated to underrun available supply by 43—44 Bcf for the period November 1980—March 1981. (Columbia Ex. 2, Response to Staff Data Request No. 4).

5. Completely eliminating the SNG from the supply available to Columbia Gas of West Virginia, Inc., would result in only a 2.6 Bcf shortfall, using the highest requirement figure (70.2 Bcf) placed into the record by Columbia during the hearings in this case and would result in a surplus of either .5 Bcf or 6.1 Bcf using either of the other requirements figures placed into the record of this case by Columbia (Columbia Ex. 1, Amended, revised and Substituted Schedule 6, Revised and Substituted Schedule 6, Original Schedule 6; Tr. Vol. I, p.82).

6. The 2.6 Bcf shortfall which could occur if all SNG was eliminated from the supply available to Columbia Gas of West Virginia, Inc., if Columbia's requirements reach the highest estimate presented at the hearing, would be eliminated as a result of the 43—44 Bcf underrun of Columbia Gas Transmission Corporation's requirements to supply for the period November 1980—March 1981 (Columbia Ex. 2, Response to Staff Data Request No. 4).

7. The average rate of Columbia Gas Transmission Corporation is projected to be $2.6868 per Mcf during the period November 1980—October 1981 (Staff Data Request Ex. 3, page 3 of 3; Appendix A).

8. Columbia Gas of West Virginia, Inc. entered into the SNG contract on July 26, 1973 (J.R. Lee Ex. 1).

9. Columbia Gas of West Virginia, Inc. did not place the SNG contract before this Commission until it was ordered to do so by order entered on June 16, 1976, in Case No. 8000.

10. This Commission, in granting after the fact approval to the entering into of the SNG contract by Columbia, expressly did not approve the terms and conditions of the contract, as permitted by W.Va. Code §24-2-12(f) (Case No. 8817, Order entered December 10, 1976).

CONCLUSIONS OF LAW

1. It is unreasonable to require West Virginia ratepayers to pay higher prices which reflect the cost of SNG, when that SNG is not needed by Columbia Gas Transmission Corporation to serve Columbia Gas of West Virginia or by Columbia gas of West Virginia to meet the requirements of its customers.

2. It is reasonable to reprice the volumes of SNG included in Columbia's Rule 30-C filing in this case to the average pipeline rate of $2.6868 per Mcf for the period November 1980—October 1981, since the repricing will eliminate the unjust burden of the SNG costs from Columbia's ratepayers, while at the same time, allowing Columbia to recover a portion of the cost of SNG, since that gas will be used by Columbia.

3. Circumstances such as those facing the Commission in this case in which a regulated utility has, by contract, committed itself to pay high prices for a commodity when lower priced alternatives are available to serve the utility's customers must be considered as exceptions to the general standards set forth in the *Hope* and *Permian Basin* cases, set forth previously in this order.

ORDER

IT IS, THEREFORE, ORDERED that:

1. The purchased gas costs approved for use by Columbia Gas of West Virginia, Inc. for all gas supplied on and after November 1, 1980, in the Commission's Interim Order in this case, dated October 31, 1980, be and they hereby are, reduced to reflect the repricing of the SNG volumes included in those costs to the projected Columbia Gas Transmission Corporation average rate to Columbia of $2.6868 per Mcf for the period November 1980 through October 1981.

2. Repricing of SNG to the actual pipeline rate per Mcf will be reflected in the actual cost recovery mechanism of rule 30-C in Case No. 81-366-G-30C, Columbia Gas of West Virginia, Inc.'s most recent 30-C filing.

3. The purchased gas costs approved for use by Columbia Gas of West Virginia, Inc. for all bills rendered on and after November 1, 1980 through October 31, 1981 are as follows: $2.813 per Mcf for IUS rates and $2.931 per Mcf for all othe rates. See Appendix A.

A TRUE COPY

TESTE:

/s/Howard M. Cunningham
HOWARD M. CUNNINGHAM
Executive Secretary

Commissioner Bresette dissents and files his dissenting opinion herewith.

APPENDIX A

COLUMBIA GAS OF WEST VIRGINIA, INC.
CASE NO. 80-336-G-30C

CALCULATION OF PURCHASED GAS COSTS AT INTERIM AND FINAL LEVELS

	Purchase Volume (Mcf)	80-336 Interim Order ($)	80-336 Final Order ($)
CGTC Tariff Rate	65,652,700	176,395,040	176,395,040
SGES and Crawford Storage	0	2,422,650	2,422,650
Columbia LNG Corp.	4,951,582	23,783,646	13,303,911[1]
Other Purchases	174,135	334,516	334,516
Prior Period Adjustments	0	(1,108,070)	(1,108,070)
Total Cost		201,827,782	191,348,047
Projected Sales Volume (Mcf)		68,216,500	68,216,500
PGC before B&O Tax		$2.959	$2.805
Rates Adjusted for B&O Tax			
GS & LV (tax factor 1.04482)		3.092	2.931
IUS (tax factor 1.0027)		2.967	2.813

[1] Average pipeline gas cost: $\frac{\$176{,}395{,}040}{65{,}652{,}700 \text{ Mcf}} = \$2.6868/\text{Mcf}$

Adjusted SNG Cost: $2.6868/Mcf × 4,951,582 Mcf = $13,303,911

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

Entered: October 30, 1981

CASE NO. 80-336-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC., a corporation.
Application to change rates, effective 11-1-80 according to Rule 30C, General Order No. 183.4, Purchased Gas Application.

COMMISSIONER BRESETTE'S DISSENTING OPINION

I dissent to the decision of the majority to disregard the SNG contract between Columbia and CLNG and reprice the SNG volumes of Columbia's gas supply to the CGTC average commodity rate and wish to set forth my reasons for this dissent.

The majority opinion is apparently predicated upon the proposition that, since Columbia may not need the SNG to serve its customers during the November 1980—October 1981 period, Columbia's customers should not be required to pay for it in purchased gas costs. While, under normal circumstances the idea that utility customers should only pay for what is needed to serve them may be reasonable, to isolate this particular circumstance at this time is to ignore business reality and this Commission's past experience with Columbia and the SNG contract, as well as the potential for future detrimental consequences if the SNG contract is disregarded at this time.

By orders entered on January 14, 1972 and July 31, 1972 in Case No. 7300, the Commission approved restric-

tions on service to new customers by Columbia. These orders resulted in Columbia adding no new customers without the specific authorization of the Commission until July 1979. As Company witness Lee testified, without the supplies of SNG delivered under the contract, even with the prohibition against adding new customers, Columbia would not have been able to meet its customers' requirements during the abnormally cold winters of the late 1970's (J. R. Lee, Ex. 1, p. 4).

As a result of a variety of fortuitous circumstances, all of which are beyond the control of Columbia, currently the Company has an excess of supply (Columbia Ex. 3). No one is able to predict the duration of the current glut. No one is able to state that in the next few years there will not be another shortage of natural gas such as was experienced during the 1970's. During that previous shortage of natural gas, Columbia's customers and this Commission benefitted greatly from the supplies of gas delivered under the SNG contract. In the future, Columbia's customers and the Commission may well benefit again from the SNG contract.

Columbia has a public service obligation to supply its customers with the natural gas they require. This Commission would expect Columbia to fulfill that demand under all but the most dire of circumstances. However, disregard of the SNG contract at this time, thus impairing Columbia's ability to pay CLNG, would certainly lead CLNG to refuse to contract with Columbia in the future and, thus, eliminate an assured supply of gas for Columbia's customers, a supply of gas which served Columbia's customers well in the recent past. Columbia's decision to enter into the SNG contract represented a good faith effort by Columbia to insure that its customers had an adequate and stable supply of gas. By disregarding the SNG contract, the majority is, in effect, telling Columbia not to take the extra step to supply customers with gas. The majority

opinion will assuredly take away any incentive Columbia might have to seek out and develop long-term supplies of gas which could see the Company's customers through future shortages.

Naturally, hindsight is much more accurate than foresight. If, in 1972, Columbia had been able to foresee that it would have an oversupply of natural gas in 1980, the Company could have taken appropriate measures. Unfortunately, neither Columbia nor this Commission has the ability to see into the future. I would not castigate Columbia for following the course of action that appeared to be most judicious based on the information available to Columbia at the time.

An analysis of the effect of the majority opinion on Columbia and the individual customer produces some enlightening results. The majority decision will result in a net loss to Columbia of approximately $10,480,000, an alarmingly large penalty to pay for an action which, until now, was considered to be reasonable. The "great burden" on the customer, however, which the majority decision casts away amounts to only $20 per year for the average residential customer. It is clear to me that the crushing penalty levied by the majority opinion on Columbia is not balanced by the insignificant benefit which will be reaped by the individual residential customer.

At the time Columbia entered into the SNG contract, it was a prudent and responsible action. Until today, a majority of this Commission recognized that fact and continued to include SNG in Columbia's cost of purchased gas. I will not, at this time, ignore all of this past experience and, on the basis of circumstances which are totally beyond the control of Columbia, penalize the Company for the very act for which it was applauded during the recent gas shortage.

We will be in a difficult position to ask or require companies to incur extra costs or make substantial investments and long-term contracts to assure a supply of product to customers if the Commission intends to make a habit of "pulling the rug out from under" them whenever the hard times disappear.

Therefore, I strongly believe we should not now exercise our authority to disregard the SNG contract.

/s/Elwin Bresette
COMMISSIONER ELWIN BRESETTE

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

Entered by the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 18th day of December, 1981.

CASE NO. 80-336-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Application to change rates, effective November 1, 1980, according to Rule 30-C, General Order No. 183.4, Purchased Gas Application.

CASE NO. 81-366-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Application for approval of purchased gas costs proposed to be included in rates effective November 1, 1981, under Rule 30-C, General Order No. 183.4

CASE NO. 80-336-G-30C

On October 31, 1980, the Commission entered an interim order in this case allowing "Columbia" to increase rates to reflect projected increases in purchased gas costs for the period November 1, 1980 through October 31, 1981. On October 30, 1981, the Commission entered its final order in this proceeding which, among other things, reduced the purchased gas costs approved for use by Columbia Gas of West Virginia, Inc., for all gas supplied on and after

November 1, 1980, to reflect the repricing of the SNG volumes included in those costs. The higher cost SNG volumes were repriced to the level of the projected Columbia Gas Transmission Corporation average natural gas cost for the period November, 1980 through October, 1981 of $2.5868 (sic) per Mcf.

On November 9, 1981, Columbia Gas of West Virginia, Inc., a corporation, filed a petition for a corrective order or for rehearing and reargument on the SNG issue.

CASE NO. 81-366-G-30C

On October 30, 1981, the Commission entered an interim order in this proceeding which, among other things, authorized Columbia Gas of West Virginia, Inc. to recover a purchased gas component of $3.70 per Mcf. Adjusted for B&O taxes, this cost becomes $3.855 for General Service (GS) and Large Volume (LV) customers and $3.71 for Intrastate Utility Sales (IUS) customers.

In the interim order, the Commission adopted the position it took in Columbia's last 30-C case, Case No. 80-336-G-30C, and repriced the high cost SNG volumes down to the average cost of natural gas for Columbia Gas Transmission Corporation.

On November 9, 1981, Columbia Gas of West Virginia, Inc., a corporation, filed a petition for hearing and argument on the Commission's October 30, 1981 order on theSNG(sic) issue.

The Commission is of the opinion that the petition for reconsideration in Case No. 80-336-G-30C and the petition for hearing and argument in Case No. 81-366-G-30C should be consolidated for hearing because the issues in both petitions are similar.

IT IS, THEREFORE, ORDERED that the petition for reconsideration in Case No. 80-336-G-30C and the petition for hearing and argument in Case No. 81-366-G-30C be, and the same hereby are, consolidated for hearing to be held in the Commission's Hearing Room at the Capitol in the City of Charleston on January 20, 1982, at 9:30 a.m.

IT IS FURTHER ORDERED that Columbia Gas of West Virginia, Inc., a corporation be, and the same hereby is, required to file ten (10) copies of its direct testimony and exhibits in support of its petitions by no later than 5:00 p.m., January 8, 1982.

IT IS FURTHER ORDERED that Staff and all intervenors ard (sic) required to file ten (10) copies of their direct testimony and exhibits by 5:00 p.m., January 15, 1982.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission shall send a copy of this order by United States Certified Mail, return receipt requested, to all parties of record in these proceedings.

A TRUE COPY

TESTE:

/s/Howard M. Cunningham
HOWARD M. CUNNINGHAM
Exectuive Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

Case No. 80-336-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.

ORDER ON RECONSIDERATION

AND
Case No. 81-366-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.

FINAL ORDER

ENTERED:

June 28, 1982

Chairman E. Dandridge McDonald
Commissioner Otis D. Casto

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.

ORDER ON RECONSIDERATION
IN CASE NO. 80-336-G-30C AND
FINAL ORDER IN CASE NO. 81-366-G-30C

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

APPEARANCES

CASE NO. 80-336-G-30C

1. Charles R. McElwee, Thomas E. Morgan and Andrew J. Sonderman,
   appearing on behalf of
   Columbia Gas of West Virginia, Inc.;

2. Robert R. Rodecker and Reichard E. Hitt of the Legal Division,
   appearing on behalf of
   Commission Staff; and

3. Lee F. Feinberg
   appearing on behalf of
   Weirton Steel, Division of
   National Steel Corporation,
   Intervenor.

CASE NO. 81-366-G-30C

1. Charles R. McElwee, Thomas E. Morgan and Andrew J. Sonderman,
   appearing on behalf of
   Columbia Gas of West Virginia, Inc.;

2. Robert R. Rodecker and Richard E. Hitt of the Legal Division,
   appearing on behalf of
   Commission Staff;

3. Lee F. Feinberg,
   appearing on behalf of
   Chattanooga Glass Company,
   Crescent Glass Company,
   Diamond Shamrock Corporation,
   Fostoria Glass Company,

Globe Refractories, Inc.,
Homer Laughlin China Company,
Monsanto Company,
The Goodyear Tire & Rubber Company,
and Weirton Steel,
Division of National Steel Corporation,
all known as West Virginia Industrial Intervenors;

4. Billy Jack Gregg, Director,
Consumer Advocate Division of the
Public Service Commission.

5. Robert E. Wise,
appearing on behalf of
Robert Knightstep and others;

and

6. Jon Reed, Timothy Huffman and George Stokes,
Assistant Attorneys General,
appearing on behalf of the
Attorney General of the State of West Virginia.

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 28th day of June, 1982.

CASE NO. 80-336-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.

Application to change rates effective
November 1, 1980 according to Rule 30-C,
General Order 183.4, Purchased Gas
Application.

CASE NO. 81-366-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Application to change rates, effective
November 1, 1981, according to Rule 30-C,
General Order 183.4, Purchased Gas
Application.

ORDER ON RECONSIDERATION IN CASE NO. 80-336-G-30C AND FINAL ORDER IN CASE NO. 81-366-G-30C

PROCEDURE

Case No. 80-366-G-30C

On August 1, 1980, Columbia Gas of West Virginia, Inc. (Columbia or CGWV), a corporation, filed an application with the Commission to change rates for gas service in compliance with the commission's General Order No. 183.4, issued on June 26, 1979 (Rule 30-C).

By order entered on August 27, 1980, this matter was set for hearing to be held in the Commission's Hearing Room at the Capitol in the City of Charleston on October 7, 1980, at which time and place the parties were to address the issues in this case, including: (1) the need for synthetic natural gas (SNG) based upon the most recent gas supply-demand data; and (2) considering recent communications from Columbia to the Commission, the extent to which SNG and liquefied natural gas (LNG) can be replaced by other supplies of gas. Columbia was also ordered to present

detailed evidence relating to the reasonableness of its proposed purchased gas costs in general. Initial hearings were held as scheduled on October 7, 1980, and continued through October 8, 1980. At the close of hearing on October 8, the Commission set this matter for further hearing and oral argument to be held on October 23, 1980, and established a briefing schedule.

The further hearing was held as scheduled on October 23, 1980, and continued on October 24 and 28, 1980. During this phase of hearings the Commission's Staff recommended that the Commission abrogate the contract between Columbia and Columbia LNG Corporation (CLNG), which issue, as well as certain subsidiary issues, the Commission set for further briefing.

On October 31, 1980, the Commission entered an Interim Order in this case, approving an interim purchased gas cost for Columbia to be effective for all gas supplied on and after November 1, 1980, subject to modification as a result of any subsequent decision regarding the cost of SNG and its inclusion in Columbia's cost of purchased gas.

On October 30, 1981, the Commission entered its Final Order in this case, determining that it had authority and jurisdiction to exclude from Columbia's cost of purchased gas the full cost of the SNG volumes purchased by Columbia from CLNG and to reprice those volumes to the projected Columbia Gas Transmission Corporation (CGTC or Transmission Corporation) average commodity rate to Columbia of $2.6868 per Mcf for the period November 1980 to October 1981, and further ordering that the repricing of SNG to the actual pipeline rate per Mcf, in this case, be reflected in the actual cost recovery mechanism of Rule 30-C in Case No. 81-366-G-30C, Columbia's most recent Rule 30-C filing. On November 9, 1981, Columbia filed a Petition for a Corrective Order or for Rehearing and Reargument and a brief in support thereof. Prior to

Commission disposition of the petition for rehearing, Columbia appealed the October 30, 1981 Commission Order to the Supreme Court of Appeals of West Virginia pursuant to W.Va. Code §24-25-1.

On December 7, 1981, the Commission entered an order granting a stay of its October 30, 1981 order in this case, insofar as the SNG costs were to be repriced to reflect the average Transmission Corporation cost of gas, until the Commission finally disposed of Columbia's petition for rehearing. On December 18, 1981 the Commission entered an order granting a rehearing in this case and consolidating it with Case No. 81-366-G-30C for the purpose of hearing and argument. On December 29, 1981, the Commission moved that the Supreme Court dismiss Columbia's appeal on the basis that such appeal was not ripe for review by the Court. On March 11, 1982, the Supreme Court dismissed Columbia's appeal on the basis of said motion.

Case No. 81-366-G-30C

On August 3, 1981, Columbia filed another application with the Commission pursuant to Rule 30-C, seeking an increase in rates of approximately $95 million to be effective November 1, 1981.

On September 18, 1981, Columbia amended its application filed in this case. In its amended application, the Company reduced its total gas costs and proposed that, instead of an annual adjustment rate end period, the Commission approve the use of a three-tiered rate to become effective throughout the year, with the first rate to be effective from November 1 through February 28, 1982, the second increment to be effective from March 1, 1982 through August 31, 1982 and the third increment to be effective from September 1 through October 31, 1982.

By order dated August 17, 1981 this matter was set for hearing to be held on October 1, 1981. On September 25,

1981, the Commission's Staff filed a motion to continue the hearing in this case until January 5, 1982, and to indefinitely postpone any increase in rates which would otherwise become effective on November 1, 1981. In support of its motion, Commission Staff indicated that it needed additional time to adequately prepare its case because of the complexity of the issues and because of the need for additional data.

The hearing was held as scheduled on October 1, 1981, at which time the Commission Staff and various intervenors in this case urged the Commission to allow an interim increase in Columbia's purchased gas recovery rate pending further hearings in this case.

By order entered on October 30, 1981 the Commission issued an order in this case, which granted the various motions to continue these hearings and established a procedural schedule in this case which called for further hearings in this case to be held beginning January 5, 1982. Additionally, the Commission allowed Columbia Gas of West Virginia, Inc. to place an increased purchased gas increment into effect, pending the further hearings and final decision in this case. Further, the Commission required Columbia to file an undertaking, agreeing to refund the excess, if any, of revenues collected under this interim rate over revenues finally approved in this case, should the final rate approved be lower than the interim rate.

On November 9, 1981, Columbia filed a Petition for Hearing and Argument with respect to the portion of the October 30, 1981 order which adopted the policy of repricing SNG in accordance with the Commission's order in Case No. 80-336-G-30C. This petition was consolidated procedurally with the Petition for a Corrective Order or for Rehearing and Argument filed in Case No. 80-336-G-30C and was given the same treatment as was the petition in Case No. 80-336-G-30C.

On January 20, 1982, hearings commenced on the consolidated cases and terminated on February 8, 1982.

ISSUES

There are only four issues to be addressed in this consolidated proceeding:

(1) The proper treatment of SNG costs in both cases;
(2) The proper treatment of over and under-recoveries of gas costs;
(3) The proper treatment of Section 107 gas; and
(4) The proper treatment of cost associated with LNG.

The last three issues relate solely to Case No. 81-366-G-30C. As a result of the consolidation of these two cases, the discussion on the issue of SNG for both cases will be consolidated for the purposes of this order. Any discussion with regard to the remaining issues relate (sic) solely to Case No. 81-336-G-30C. The SNG issue contains several sub-issues, both jurisdictional and factual. Each of these will be discussed individually subsequently in the order.

DISCUSSION

I. Inclusion of SNG Costs in Columbia's Cost of Purchased Gas

This issue is basically the same issue as was addressed by the Commission in our Final Order in Case No. 80-336-G-30C. Columbia has raised several jurisdictional challenges to this Commission's authority to reprice the SNG as we did in both the Final Order in Case No. 80-336-G-30C and the Interim Order in Case No. 81-366-G-30C, both orders entered on October 30, 1981.

Having reviewed the arguments of all parties, both jurisdictional and factual, the applicable law in this jurisdiction and the record in these consolidated cases, the Commission is of the opinion that we should affirm our decision to reprice the volumes of SNG purchased by Columbia from CLNG under the SNG contract. In order to address this issue as lucidly as possible, we will first discuss the background of the SNG contract. Second, we will discuss the basis for our assertion of jurisdiction to take action with regard to repricing the SNG volumes in Case No. 80-336-G-30C and last, we shall address each of the jurisdictional and other assorted legal challenges raised by Columbia to our assertion of authority to reprice the SNG volumes and our decisions to reprice those SNG volumes.

A. Background of the SNG Contract

The Synthetic Gas Purchase and Sales Agreement between Columbia LNG Corporation and Columbia Gas of West Virginia, Inc., was entered into on July 26, 1973 (J.R. Lee Ex. 1). On June 16, 1976, almost three years subsequent to Columbia's entering into the contract, in Case No. 8000, the Commission ordered Columbia to comply with W.Va. Code §24-2-12 by seeking the consent and approval of the Commission for its arrangement for the sale, purchase and exchange of gas produced at the reforming plant located at Green Springs, Ohio, with its affiliates, Columbia Gas Transmission Company and CLNG. 63 ARPSCWV 559 at 593 (1976). In that case, the Commission determined that it had the authority to adjust the actual costs incurred by Columbia associated with SNG and made certain adjustments to Columbia's cost of service before including the adjusted cost of SNG in Columbia's cost of service for ratemaking purposes. On December 10, 1976, in Case No. 8817, the Commission granted its consent to the entering into of the aforesaid sales agreement without approving the terms and conditions thereof, as

authorized in W.Va. Code §24-2-12, and provided that such consent would not be deemed to bind the Commission in any ratemaking proceeding involving Columbia. 64 ARPSCWV 1029 (1976).

In Case No. 9147, the Commission adjusted the cost of the SNG for ratemaking purposes, before including the adjusted cost of SNG in Columbia's cost of service and reasserted its authority to review the SNG costs in order to determine their reasonableness. 66 ARPSCWV 488, 494 (1978). In Case No. 79-088-G-42T, Final Order entered July 17, 1980, a general ratemaking proceeding for Columbia Gas of West Virginia, Inc., this Commission again affirmed its authority to adjust certain costs associated with the SNG contract and made those adjustments to the cost of the SNG volumes before including the adjusted cost in Columbia's cost of service for its West Virginia jurisdictional business. In that same case, however, the Commission refused to adopt a Staff recommended adjustment which would have repriced the SNG volumes to the average Transmission Corporation commodity rate, finding that Columbia had presented substantial evidence indicating that the SNG volumes were needed in order for Columbia to be able to adequately supply its West Virginia customers.

On August 1, 1980, as indicated previously, Columbia filed its application in Case No. 80-336-G-30C in order to change rates for gas service in compliance with the Commission's Rule 30-C purchased gas proceeding. By order entered on August 27, 1980, this Commission ordered the parties to that proceeding to address the need for SNG based upon the most recent gas supply-demand data and the extent to which SNG could be replaced by other supplies of gas. That case is still before us now, in the form of hearing on the Petition for Reconsideration filed by Columbia in November of 1981, following our entry of a final order in that case on October 30, 1981.

B. Basis for Commission Assertion of Jurisdiction in the Final Order in Case No. 80-366-G-30C

The starting point for this Commission's assertion of jurisdiction to disregard the contract between Columbia and CLNG for ratemaking purposes and disallow a portion of the cost of the SNG to be included in Columbia's rates in our Final Order entered on October 30, 1981, in Case No. 80-336-G-30C, was and is W.Va. Code §24-2-12 (1980 Replacement Volume), which states, in part, that:

> *Unless the consent and approval of the public service commission of West Virginia is first obtained* . . . (f) *no public utility subject to the provisions of this chapter, may, by any means, direct or indirect, enter into any contract or arrangement for* management, construction, engineering, *supply*, or financial services, *or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.*
>
> Every assignment, transfer, lease, sale, or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof, and *every contract*, purchase of stock, arrangement or other transaction *referred to in this section made otherwise than as hereinbefore provided shall be void to the extent that the interests of the public in this State are adversely affected*, but this shall not be construed to relieve any utility from any duty required by this section. (Emphasis added).

As we determined in our Final Order in Case No. 80-336-G-30C, this Code section confers upon the Commission sufficient authority to regulate, modify or disapprove any contract with an affiliated company, which is entered

into by a public utility subject to the jurisdiction of this Commission. We pointed out in that order that unless Columbia came before this Commission, prior to entering into such a contract, and obtained either Commission approval or an exemption from this section, any contract entered into by Columbia with an affiliated company would be void insofar as it adversely affected the interests of this State. As we noted in that order, by the plain language of this statute, any contract entered into in violation of its provisions must be voidable for ratemaking purposes. We further pointed out that Columbia had, indeed, entered into this contract in violation of that statutory section, which quite explicitly states that *unless the approval of the Commission is first obtained,* Columbia could not enter into any contract for the supply or furnishing of any service, property or thing with an affiliated corporation. We pointed out that Columbia entered into this contract in 1973, almost three years before it filed the SNG contract with this Commission for approval. By the plain language of W.Va. Code §24-2-12, this Commission has only the authority to determine whether or not at the time of our current examination of the contract, the interests of the public in this State are adversely affected. To the extent that the interests of the public in this State are not adversely affected, the SNG contract may be considered valid by this Commission; to the extent that the interests of the public in this State are adversely affected by the SNG contract, it is void, for ratemaking purposes. This determination is not discretionary with the Commission. The plain language of W.Va. Code §24-2-12 requires and demands that finding by the Commission.[1]

In our Final Order in Case No. 80-336-G-30C, we also

---

[1] A reasoned interpretation of W.Va. Code §24-2-12 could also require this Commission to find that on December 10, 1976, in Case No. 8817, the previous Commission had the authority only to determine that the interests of the State were not adversely affected by the SNG contract at that time, rather than approve Columbia's entry into the contract outright, since W.Va. Code §24-2-12 contains no method for curing a defect such as an entry into a contract in violation of that Code section.

pointed out that in every order entered by this Commission, which dealt with the SNG contract in any manner, we consistently reaffirmed our authority and resolve to adjust the costs associated with the SNG agreement whenever we determine that those costs should not be included in full in Columbia's cost of service. The order of the Commission in Case No. 8817 did not approve the terms and conditions of the SNG contract and provided that any such consent to enter into the contract would not be deemed to bind the Commission in any ratemaking proceeding involving Columbia, and that sentiment was echoed in Case Nos. 9147 and 79-088-G-42T, *supra*.

Finally, in our Final Order in Case No. 80-336-G-30C, this Commission stated that the SNG contract must be deemed to have been entered into in contemplation of the exercise by the State of its regulatory power whenever the public interest required the exercise of that power. The Commission found support for this position in *Preston County Light and Power Company v. Renick, et al.*, 145 W.Va. 115, 113 S.E.2d 378 (1960), in which case the Supreme Court of Appeals of West Virginia stated:

> Though as a general rule public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the State, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties, *the principle is firmly established that all contracts made by a utility relating to the public service must be deemed to be entered into in comtemplation of the exercise by the State of its regulatory power whenever the public interest may make it necessary; and when such contracts are the subject of statutory regulation, no contract for service may be made by a a public utility except as provided by law*, although an otherwise

> valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority. 145 W.Va. at 129 (emphasis added).

Thus, as a result of all of the above-stated authority, this commission determined in Case No. 80-336-G-30C, that it did indeed have the authority to disregard the SNG contract *for ratemaking purposes* and to disallow part or all of the SNG costs, if the Commission determined that those costs were unreasonable. Looking back on these authorities, the Commission is of the opinion that they stand unscathed as a basis for a Commission determination that it has the authority to exclude from Columbia's cost of service all or part of the costs associated with the SNG contract, if we determine that the SNG contract is not operating in the interests of the people of the State of West Virginia. Thus, the Commission is of the opinion that our decision in our Final Order in Case No. 80-336-G-30C should be affirmed on the question of our basic authority to adjust the costs associated with the SNG contract to be included in Columbia's West Virginia jurisdictional cost of service.

C. Challenges Raised by Columbia to Our Exercise of Jurisdiction Over the Costs Associated with the SNG Contract

Columbia has raised numerous legal challenges to this Commission's assertion of authority to exclude from Columbia's cost of service part or all of the expenses associated with the SNG contract. These challenges range from constitutional challenges based upon the commerce and contract clauses of the United States Constitution to challenges based upon various sections of Chapter 24 of the West Virginia Code. Each of these challenges will be discussed separately.

1. Deprivation of Full Cost Recovery Would Constitute an Impermissible Interference with Interstate Commerce

Columbia's initial challenge to this Commission's exercise of authority on the issue of the SNG contract states that this Commission would be violating the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, which states that, "The Congress shall have Power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes; . . ." According to Columbia, any action this Commission would take which would impair Columbia's ability to fully perform its contractual obligations to CLNG or which would prohibit Columbia's performance under the SNG contract would constitute an impermissible burden on interstate commerce under the commerce clause. The Commission is of the opinion that Columbia's reliance upon this argument is misplaced. Our actions neither place an impermissible burden on interstate commerce, nor do they in any manner prohibit Columbia from performing its obligations under the SNG contract. What this Commission has done is to state that costs incurred by a local distributing company engaging in intrastate commerce, i.e. delivering gas for local consumption to ultimate consumers of the product, must be reasonable, may not adversely affect the interests of the people of this State and must be incurred pursuant to West Virginia State Law. This Commission has merely directed that Columbia's West Virginia jurisdictional customers not be required to bear the full burden of costs for gas which is not needed to serve them and which is of a higher price than other gas which is reasonably available to Columbia.

The United States Supreme Court has long held that natural gas is a lawful article of commerce and that its transmission from one state to another for sale and consumption in the latter is interstate commerce, thus rendering a state law, which by its necessary operation prevents

obstructs or burdens such transmission, a prohibited regulation or interference with interstate commerce. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Missouri v. Kansas Natural Gas Company*, 265 U.S. 298 (1924). Also as stated by the United States Supreme Court, in a case such as this one, there are two controlling issues: (a) Has Congress by enacting certain Federal legislation forbidden the States to regulate certain areas of commerce? or (b) if not, are the transactions which the State seeks to regulate of such a nature that the commerce clause of its own force forbids the state to act? *Panhandle Eastern Pipeline Company v. Public Service Commission*, 332 U.S. 507 (1047). Columbia asserts that our action to reprice the SNG volumes fails under both tests.

In the instant case, the Federal legislation, which Columbia alleges has removed the authority of the State to exclude part of the costs arising out of the SNG contract, is the Natural Gas Act, 52 Stat. 821, 15 U.S.C. §717 *et seq.* In 1938, Congress passed the Natural Gas Act, thus preempting the regulatory powers of the States over the transportation and sale of natural gas in interstate commerce. By the passage of that statute, "Congress comtemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere". *Public Utilities Commission of Ohio v. United Fuel Gas Company*, 317 U.S. 456 at 467 (1943). In *Panhandle Eastern Pipeline Company v. Public Service Commission, supra*, the Court further discusses the activities which Congress drew within its own regulatory power and delegated to the Federal Power Commission.[2] In the Natural Gas Act, Congress sought to regulate only three areas: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in

---

[2] The Federal Power Commission is now known as the Federal Energy Regulatory Commission (FERC).

such transportation or sale. *Panhandle Eastern Pipeline Company, supra,* at 516. According to the Court, the line of the statute was drawn cleanly between sales for resale in interstate commerce and direct sales by a company for consumptive uses, and according to the Court, was meticulous to take in only territory which the Court had held that states could not reach, which territory did not include direct consumer sales, whether for industrial or other uses. *Panhandle Eastern Pipeline Company, supra,* at 517 and 519. In *Panhandle Eastern Pipeline Company v. Michigan Public Service Commission,* the Court went on to declare that sales to industrial consumers by one engaged in interstate commerce were essentially local in nature and were subject to state regulation without infringement of the commerce clause of the Federal Constitution, pointing out that Congress had not acted to regulate the direct sale to any consumer by any entity, even one engaged in interstate commerce. *Panhandle Eastern Pipeline Company v. Michigan Public Service Commission,* 341 U.S. 329, 333-334 (1951).

It is undeniable that a state can regulate retail rates at which gas can be sold within the state, without fear of violation of the commerce clause of the United States Constitution either by infringing upon the authority delegated to the Federal Energy Regulatory Commission by Congress through the Natural Gas Act of 1938 or simply through the force of the commerce clause itself. See, *Federal Power Commission v. Transcontinental Gas Pipeline Corporation,* 365 U.S. 1 at 27 (1961); *Federal Power Commission v. Southern California Edison Company,* 376 U.S. 205 at 211-216 (1964). As the Court stated in *Federal Power Commission v. Southern California Edison Company,* "Congress meant to draw a bright line easily ascertained, between State and Federal jurisdiction . . ." 376 U.S. and 215.

In the instant case, this Commission has not attemp-

ted to intrude upon the authority of the Federal Energy Regulatory Commission by attempting to regulate rates charged by a company subject to the jurisdiction of the Federal Energy Regulatory Commission for the delivery of natural gas in interstate commerce. This Commission has stayed firmly within the allowed bounds of state regulatory action by seeking only to regulate the rate at which the local distributing company may make ultimate consumptive sales to its West Virginia jurisdictional customers. As can be seen from the authorities cited previously, the authority of a state regulatory commission to regulate the rate at which sales to ultimate consumers may be made, either by the local distributing company or an interstate pipeline engaged in making ultimate sales to consumers in this State has always been upheld by the United States Supreme Court. We are doing nothing more than that in this case.

The other issue which is present in a challenge to State action on the grounds that the State action violates the Commerce Clause of the United States Constitution requires an examination of whether, regardless of any Federal legislation, the State action violates the plain language of the Commerce Clause itself. The general rule for determining the validity of state statutes affecting interstate commerce has been stated by the United States Supreme Court, as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Company v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local

> interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). This same rule was restated in the *Great Atlantic and Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 365 (1976) at 371-372 and *City of Philadelphia v. State of New Jersey*, 437 U.S. 617 at 624 (1978). As noted in the discussion previously stated in this order, the Court has determined on numerous occasions that state regulation of retail rates for sales to consumers in the State is a legitimate local purpose, thus requiring a determination as to whether the burden imposed on interstate commerce is clearly excessive in relation to the local benefits. This Commission is of the opinion that any burden on interstate commerce which arises out of our actions, if there is indeed any such burden, is not excessive in relation to the local benefits of our action in Case No. 80-336-G-30C, which we intend to affirm in this case. We have not ordered Columbia to violate the terms of the SNG contract. We have not prohibited Columbia from paying CLNG the contract rate for SNG, and we have not attempted to find the contract rate for SNG unreasonable. We have merely stated that, as a result of: (1) the lack of need for SNG by Columbia, which was amply demonstrated by Commission Staff in Case No. 80-336-G-30C; (2) the high cost of the SNG compared to the Transmission Corporation average commodity rate; (3) the cost of gas which Columbia was turning back as a result of an excess supply; and (4) Columbia's failure to comply with the provisions of Chapter 24 of the West Virginia Code in entering into the SNG contract, it is unreasonable to require the West Virginia ratepayer to bear the entire burden of the cost of the SNG.

In a case such as the instant one, the determination as to whether or not Commission action constitutes a violation of the terms of the commerce clause itself, is, in reality,

little different from the determination of whether or not Congress has taken action which would limit the right of States to regulate commerce, discussed previously in this order. A long line of United States Supreme Court cases clearly set forth the same delineation beweeen (sic) permissible State action and impermissible burdens on interstate commerce as was established by Congress in the Natural Gas Act of 1938. ". . . [T]he commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce . . . . If a State enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free." *Missouri v. Kansas Natural Gas Company,* 265 U.S. 298 (1924), at 307, quoting from *Minnesota Rate Cases,* 230 U.S. 352 at 396. "With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation (citation omitted). In such case the effect on interstate commerce, if there be any, is indirect and incidental." *Missouri v. Kansas Gas Company, supra,* at 308. As the Court itself pointed out, in *FPC v. Southern California Edison Company, supra,* at 212, the test adopted by Congress in the Natural Gas Act was developed in a line of United States Supreme Court decisions beginning with *Public Utilities Commission v. Landon,* 249 U.S. 236 (1919), and *Pennsylvania Gas Company v. Public Service Commission,* 252 U.S. 23 (1920), and continuing through *Missouri v. Kansas Gas Company,* 265 U.S. 298 (1924). As the Court stated, the case which led directly to Congressional intervention was *Public Utilities Commission v. Attleboro Steam and Electric Company,* 273 U.S. 83 (1927), in which the Court held that the State of Rhode Island could not assert jurisdiction over the rates at which a Rhode Island company sold energy generated at its Rhode Island

plant to a Massachusetts company, which took delivery at the state line for resale to the City of Attleboro. Thus, in passing the Natural Gas Act, Congress merely codified the existing judicial thinking with regard to permissible and impermissible state action.

The Commission is of the opinion that our previous discussion in this order, indicating that our action with regard to the repricing of SNG did not violate the commerce clause by stepping into an area preempted by Federal legislation, is controlling here, as well, given the similarity between the test for determining if state action crosses into Federally preempted regulatory powers and the test for determining whether or not State action violates the plain language of the commerce clause. The action which we took in Case No. 80-336-G-30C and which we intend to affirm in these consolidated cases does not cross into the realm of an impermissible burden on interstate commerce, and, thus, Columbia's challenge to our action on that ground forms no basis upon which we can find any reason to reverse our decision.

2. Deprivation of Full Cost Recovery Would Constitute an Impermissible Intrusion Into Federal Preemption of State Jurisdiction Over the SNG Contract

Columbia's second challenge to this Commission's assertion of authority to reprice the volumes of SNG included in Columbia's cost of service states that jurisdiction by this Commission over the SNG contract between Columbia and CLNG is foreclosed, not only by the commerce clause, but because passage of the Natural Gas Act has preempted state jurisdiction over the contract by virtue of the supremacy clause of the United States Constitution, Article VI, Clause 2, which states that the Constitution and the laws of the United States shall be the supreme law of the land. According to Columbia, the enactment of the

Natural Gas Act, pursuant to the supremacy clause, preempts state jurisdiction over the SNG purchase agreement.

The Commission is of the opinion that this challenge by Columbia must fall as did the previous challenge that the Commission's action in Case No. 80-336-G-30C constituted an impermissible burden on interstate commerce. Once again, we have in no way sought to modify or abrogate the terms of the SNG contract. We have not sought to look behind the contract rate or SNG. We have not sought to prevent Columbia from fulfilling its obligations under the SNG contract. This Commission is seeking solely to regulate the retail rate at which Columbia delivers gas to its customers in this State, a right which has been upheld with great consistency by the United States Supreme as noted in the preceding section of this order.

Columbia's argument must fall for one other reason. FERC (formerly the FPC) has determined in *Re Algonquin SNG, Inc.*, FPC Op. No. 637, 97 PUR 3d 299 (1972) that it has no authority to regulate contracts for the sale of SNG volumes, due to a limitation found within Section 1B of the Natural gas Act which states as follows:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, to natural gas companies engaged in such transportation and sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The limitation is made clear by Section 2(5) of the Natural Gas Act in which natural gas is defined as either

natural gas unmixed, or any mixture of natural and artificial gas. This limitation was explicitly stated and approved in *Henry v. Federal Power Commission*, 513 F.2d 395 (1975), in which the United States Court of Appeals for the District of Columbia Circuit affirmed a determination that the Federal Power Commission had no jurisdiction over the production, transportation or sale of unmixed synthetic gas produced from coal. 513 F.2d at 398. The SNG contract between CLNG and Columbia is a contract for the sale of unmixed artificial gas, thus there is no federal legislation passed pursuant to the supremacy clause of the Constitution which acts to preempt this Commission's jurisdiction to reprice the SNG volumes. Indeed, the FPC specifically found that it had no authority to regulate the sale of SNG by Columbia LNG Corporation. See, *Re Columbia LNG Corporation*, 1PUR 4th 524 (1973). Moreover, the question of Federal preemption over the SNG contract is a non-issue, since we are not attempting to exercise any authority over the terms of the SNG contract, but are merely regulating the rate for direct sale to consumers which may be charged by Columbia.

3. Deprivation of Full Cost Recovery Would Constitute an Unconstitutional Impairment of Contract

Columbia next argues that even if the Commission's authority to deny full cost recovery of the SNG is not prohibited by the commerce clause or supremacy clause of the Constitution, the Commission's action in this case constitutes an impairment of contract in violation of Article I, Section 10, Clause 1 of the Constitution of the United States which provides, in part, that "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ." The Commission is of the opinion that this challenge to our exercise of authority to reprice the SNG volumes must also fail for two reasons. First, as we have continually stated in our various orders in these cases, this Commis-

sion has not sought to modify or abrogate the terms of the contract between CLNG and Columbia. We have only refused to allow Columbia to require its West Virginia ratepayers to bear the full burden of the cost of the SNG. And second, even if we were attempting to modify the terms of the SNG contract, such an action would come within recognized regulatory authority as set forth by the United States Supreme Court.

In *Northern Pacific Railway Company v. Duluth*, 208 U.S. 583 at 598 (1908), the Court stated that "[T]he exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contract rests, as it is beyond the authority of this State or the Municipality to abrogate this power so necessary to the public safety". In other words, the State cannot contract away its right to exercise the police power. In that same case, the Court stated that "[T]he exercise of the police power in the interest of public health and safety is to be maintanied unhampered by contracts and private interests and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution." 208 U.S. at 597. Thus, from an early date it has been well-established by the United States Supreme Court that a State may take action which would impair obligations incurred under private contracts in exercise of the police power.

In *Atlantic Coastline v. Goldsboro*, 232 U.S. 548 (1914), the Court further addressed the question of whether or not private contract rights were subjugated to the right of the state to exercise its police powers. In the case before the Court, the Supreme Court of North Carolina had determined that under the Constitution of the State of North Carolina, charters granted to railroad corporations were subject to alteration or repeal at the legislative will and the Court was squarely faced with the question of whether

ordinances enacted by a legislature in furtherance of the police power run counter to either the contract or the due process clauses of the Constitution. The Court determined that it was "settled that neither the 'contract' clause nor the 'due process' clause [of the United States Constitution] has the effect of overriding the power of the State to establish regulations which were reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant *and that all contract and property rights are held subject to its fair exercise.*" 232 U.S. at 558. (Emphasis supplied).

In *Veix v. Sixth Ward Association*, 310 U.S. 32 (1940), the Court reiterated the rule that all contracts are made subject to the paramount authority of the State to safeguard the vital interest of its people, quoting from *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934). 310 U.S. at 38. The Court in *Veix* stated that "Such authority is not limited to health, morals and safety. It extends to economic needs as well. *Utility rate contracts give way to this power* as do contractual arrangements between landlords and tenants". 310 U.S. at 38-39 (emphasis added). The Court went on to say that emergencies (such as the Depression which gave rise to the subject legislation) did not create a constitutional power, although the emergency may furnish the occasion for the exercise of the power, in explaining the Court's use of several cases dealing with emergency legislation passed at the onset of the Depression of 1932 as precedent for its decision in the instant case. In determining that the state statute at issue in *Veix* was not violative of the contract clause of the Constitution, which statute limited the right of the shareholders in building and loan associations to withdraw their shares, the Court discussed several factors with approval. According to the Court, the statute was passed in the public interest to protect the activities of the associa-

tions for the economic welfare of the state and it pointed out that the 1932 act to issue in *Veix* was one of a long series of statutes regulating the many integrated phases of the business which was the subject of the act. 310 U.S. at 37.

In *City of El Paso v. Simmons*, 379 U.S. 497 (1965), the Court again addressed the issue of the extent to which a state law could modify or impair private contracts. In the case the court stated that "[I]t is not every modification of a contractual promise that impairs the obligation of contract under Federal law, any more than it is every alteration of existing remedies that violates the contract clause". 379 U.S. at 506-507. Restating language from *Home Building and Loan Association v. Blaisdell, supra*, the Court stated that the prohibition against state impairment of contract is not an absolute one and it is not to be read with literal exactness like a mathematical formula. 379 U.S. at 508. The Court also reiterated from the *Blaisdell* opinion the sentiment that "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end has the result of modifying or abrogating contracts already in effect . . . . Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order . . . . Moreover, the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts". 379 U.S. at 508. Quoting from its decision in *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945) at 232-233, in *El Paso* the Court reiterated its statement that "the state has the soverign right . . . to protect the . . . general welfare of the people . . . . Once we are in this domain of the reserved power of a state we

must respect the wide discretion on the part of a legislature in determining what is and what is not necessary". 379 U.S. at 508-509. The Court went on to state in El Paso that the power of a state to modify or affect the obligation of a contract is not without limit and that whatever is reserved to state power must be consistent with the fair intent of the constitutional limitation of that power. 379 U.S. at 509.

In *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234 (1978), the Court gave perhaps its best discussion of the rights of a state authority to pass laws or issue orders which might impair private contractual obligations. Quoting from its decision in *Worthen V. Thomas,* 292 U.S. 426 (1934), the Court indicated that literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the state of its prerogative of self-protection. 438 U.S. at 240. As the court stated in *Spannaus, supra::*

> [I]t is to be accepted as a commonplace that the contract clause does not operate to obliterate the police power of the states. It is a settled law of this Court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under the contracts between individuals. *Manigault v. Springs,* 199 U.S. 473, 480. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Company v. McCarter,* 209 U.S. 349, 357: 'One whose

> rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter.'

438 U.S. at 241-242.

Quoting from its most recent contract clause case, *United States Trust Company v. New Jersey*, 431 U.S. 1 (1977), the Court stated that "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption". 438 U.S. at 244.

In *Allied Structural Steel Company v. Spannaus*, the Court set forth its procedure for analysis of a claim that a state law violated the contract clause and unlawfully impaired the obligation of a private contract. The Court pointed out that its first inquiry is to determine whether or not the state law has actually, in fact, impaired the obligation of a contract. As we have stated previously, in the case before us, we are of the opinion that our decision to reprice the SNG volumes for ratemaking purposes has not impaired the obligations of the contract entered into between Columbia and CLNG. The Court in *Spannaus* went on to state that the severity of the contractual impairment measures the "height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." 438 U.S. at 245. Thus, the Court is recognizing that a state law may severely impair the obligations of a private contract and still be constitutional and not be a violation of the contract clause.

In *Spannaus, supra*, the Court set forth several factors which it considers in determining whether or not a state law will survive a challenge under the contract clause of the

Constitution. As the Court pointed out, laws that have traditionally survived challenges to the Constitution fall within specified categories. First, such laws have purportedly been enacted to deal with a broad, generalized economic or social problem; second, such laws have often operated in an area already subject to state regulation at the time the contractual obligations were originally undertaken; third, such laws affect a temporary alteration of the contractual relationships of those within its coverage; and fourth, such laws are leveled at every member of a specific group. 438 U.S. at 250.

Assuming *arguendo* that the Commission's decision to reprice the SNG volumes did in fact work to impair the obligations of the parties to the SNG contract, we must then proceed to determine whether or not our actions in our Final Order in Case No. 80-336-G-30C come within the parameters of the factors set forth above which protect such state action from becoming an unconstitutional impairment of private contract rights. First, we must determine if our actions in Case No. 80-336-G-30C, and which are reaffirmed in both our Order and Rehearing in case No. 80-336-G-30C and the Final Order we are issuing in Case No. 81-366-G-30C, deal with a broad generalized economic or social problem.

Undeniably, our actions to reprice the SNG volumes did and do deal with a broad, generalized economic problem in the State of West Virginia. In the first place, we are statutorily mandated to consider economic conditions in this State when we issue orders setting rates and charges for utility companies subject to our jurisdiction. W.Va. Code §24-1-1(b). The record in this case is replete with testimony and evidence indicating that, particularly for the industrial sector of West Virginia's economy, current economic conditions are working a severe, almost catastrophic, impact on industrial production and employment in this State, and the impact of high utility rates on

these industrial corporations cannot be gainsaid (See, for example, West Virginia Industrial Intervenors Ex. No. 5, p. 1; Statement of Richard Arango, President, Independent Steelworkers Union, lodged in the file in this case; West Virginia Industrial Intervenors Ex. No. 2, pp. 2-4; Tr. 1/22/82 at 34-35). This testimony indicates the drastic impact that increasing natural gas costs are having on all of the industries in this state, which in turn is wreaking havoc on the overall state economic and employment situation. There can be no denial that our actions in repricing the SNG are predicated, in part, on the need to alleviate as much as possible the burden currently being levied upon these industrial consumers by high natural gas rates, which actions include the refusal to allow a utility company to pass through costs of high priced gas which it does not need to serve its West Virginia jurisdictional customers. Indeed, the escalating cost of natural gas for the past several years constitutes in and of itself a broad, general economic condition which justifies State action which might impair obligations of private contracts.

Under the *Spannaus* decision, *supra*, the next factor to consider is whether or not the legislation or order operates in an area already subject to state regulation at the time that the original contractural (sic) obligation was undertaken. At the time Columbia entered into the SNG contract with CLNG, it was an intrastate public utility subject to the jurisdiction of the Public Service Commission, and W.Va. Code §24-2-12, our affiliated corporation statute, had been in place for many, many years. Thus, our actions in repricing the SNG volumes did constitute action in an area already subject to state regulation at the time that Columbia undertook its contractual obligations pursuant to the SNG contract.

The third consideration in the *Spannaus* test is whether or not the action of the state affects a temporary alteration of the contractual relationships of those within

its coverage. In the instant case, Columbia has been permitted to pass through most of the costs it has incurred pursuant to the SNG contract since its entry into the contract in 1973, thus, our action will affect only the last four years of the ten-year contractual period, and, as will be discussed subsequently in this order, the repricing decision is subject to revision depending upon Columbia's ability to demonstrate its need for the SNG to serve its West Virginia customers and the cost and quantity of alternative supplies of natural gas. As a result, our action to reprice SNG volumes does constitute a temporary alteration of the contractual relationship between Columbia and CLNG, if, in fact, our action impairs the ability of Columbia to fulfill its contractual obligations pursuant to the SNG contract.

The fourth consideration under the *Spannaus* test, whether the state action is leveled at every member of a particular class, is really not pertinent to our discussion of the instant case, since this is a(sic) not a rulemaking proceeding in which the Commission has singled out Columbia for different treatment, but is a specific rate case filed by Columbia in order to increase its rates and charges. Columbia is the only member of the subject class.

The above discussion clearly indicates that, assuming *arguendo* that Commission action to reprice the SNG volumes does in fact constitute an impairment of the SNG contract, the Commission action falls squarely within the test established by the United States Supreme Court in order to determine whether or not the state action can validly withstand the constitutional challenge. However, we reiterate that our action to reprice the SNG volumes does not constitute an impairment of contract at all, since we have not prohibited Columbia from taking the SNG volumes, paying CLNG for the SNG volumes or otherwise fulfilling its obligations under the SNG contract.

4. Deprivation of Full Cost Recovery Exceeds the Authority Delegated to this Commission Under State Law

Columbia is arguing that this Commission does not have authority under West Virginia Law to reprice the SNG volumes. The Commission disagrees. We are of the opinion that we have undeniable authority under Chapter 24 of the West Virginia Code to investigate Columbia's expenses and to refuse to include in Columbia's cost of service those expenses which this Commission determines to have been improvidently incurred or otherwise unjust and unreasonable. An examination of this Commission's authority must of necessity begin with Chapter 24 of the West Virginia Code. W.Va. Code §24-1-1 sets forth the legislative purpose and policy with regard to the Public Service Commission and its authority. W.Va. Code §24-1-1 states as follows:

> (a) It is the purpose and policy of the legislature in enacting this chapter to confer upon the public service commission of this State the authority and duty to *enforce and regulate* the practices, services and *rates* of public utilities in order to:
>
> (1) Ensure fair and prompt regulation of public utilities *in the interest of the using and consuming public;*
>
> (2) Provide the availability of adequate, *economical* and reliable utility services throughout the State;
>
> (3) Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the State's energy resources, such as coal;

(4) Ensure that the rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference and based primarily on the costs of providing these services; and

(5) Encourage energy conservation and *the effective and efficient management of regulated utility enterprises.*

(b) The legislature creates the public service commission to exercise the legislative powers delegated to it. The *public service commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the State's economy* and the interests of the utilities subject to its jurisdiction in its deliberations and decisions. (Emphasis supplied).

W.Va. Code §24-2-1 provides that the jurisdiction of the Commission shall extend to all public utilities in the State and shall include any utility engaged in the transportation of oil, gas or water by pipeline and supplying water, gas or electricity, by municipalities or others. W.Va. Code §24-2-2 states that:

The Commission is hereby given power to investigate *all rates,* methods and *practices* of public utilities subject to the provisions of this chapter; to require them to conform to the laws of this State and to all rules, regulations and orders of the commission not contrary to law . . .. *The Commission may change any intrastate rate, charge or toll* which is unjust or unreasonable or any interstate charge with respect to matters of a purely local nature which have not been regulated by or pursuant

to act of Congress . . . . But in no case shall the rate, toll or charge be more than the service is reasonably worth, considering the cost thereof.

W.Va. Code §24-2-3 states:

The Commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public uilities . . . . And whenever the Commission shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by an order fix reasonable rates, joint rates, tariffs, tolls or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or otherwise in violation of any provisions of law . . . .

W.Va. Code §24-2-4a states as follows:

[N]o public utility subject to this chapter . . ., shall change, suspend or annul any rate, joint rate, charge, rental or classification except after thirty days' notice to the commission and the public . . .; but the commission may enter an order suspending the proposed rates as hereinafter provided.

Whenever there shall be filed with the commission any schedule stating a change in the rates or charges, . . . or any new individual or joint regulation or practice affecting any rate or charge, the commission may either upon complaint or upon its own initiative without complaint, enter upon a hearing concerning the propriety of such rate, charge, classification, regulation or practice . . . .

> At any hearing involving a rate sought to be increased or involving the change of any rate, charge, classification, regulation or practice, the burden of proof to show that the increased rate or proposed increased rate, or the proposed change of rate . . . is just and reasonable shall be upon the public utility making application for such change.

The above-referenced statutory provisions clearly evidence the authority of this Commission to investigate any proposed rate of Columbia Gas of West Virginia, Inc., and intrastate public utility subject to our jurisdiction, and to make whatever changes we deem appropriate, based upon the evidence in the record. Columbia's argument in essence asserts that this Commission has no authority to refuse to pass through unreasonable costs incurred by Columbia, if Columbia entered into a contract which requires it to make certain payments to another party. The purpose of establishing a regulatory commission such as this one is precisely to prevent consumers of the State from being burdened with unreasonable costs incurred by a public utility under precisely those types of conditions. However, this Commission need not rely solely on the plain language of the Chapter 24 of the West Virginia Code. The Supreme Court of Appeals of West Virginia has spoken on many occasions with regard to the extent of this Commission's authority over the public utilities subject to its jurisdiction, and has in fact addressed the right of this Commission to take actions which could result in the modification or impairment of a contract entered into by a public utility subject to our jurisdiction.

> Though as a general rule public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the State, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties, the principle is firmly established that all contracts made by a utility relating to the public service must be

> utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the State of its regulatory power whenever the public interest may make it necessary; and when such contracts are the subject of statutory regulation, no contract for service may be made by a public utility except as provided by law, although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority.

Preston County Light and Power Company v. Renick, 145 W.Va. 115 at 129, 113 S.E.2d 378 (1960), quoting from 73 C.J.S. Public Utilities §5 and 43 Am. Jur., Public Utilities and Services §98.

In *Mill Creek Coal and Coke Company v. Public Service Commission*, 84 W.Va. 662, 100 S.E. 557 (1919) the West Virginia Court stated that "Private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict." 84 W.Va. at syllabus pt. 9. Additionally, the Court held, quoting from its decision in *City of Benwood v. Public Service Commission*, 75 W.Va. 127, (1915) that:

> [T]he ratemaking power is an incident of the police power of the State, and may be exercised without impairing the obligation of contracts or depriving of property without due process of law within the meaning of the Federal and State Constitutions . . . . Surely it is in the interest of public convenience and the general welfare that rates of public utilities be subject to regulation, both as a protection against extortionate charges and at the same time for the purpose of safeguarding to a utility so restricted a reasonable return upon its investment. It must of course be recognized that a peculiar sanctity inheres in contracts entered

> into between parties competent to contract, and that the obligations thereby imposed will not lightly be disturbed. But the same policy that forbids to a utility total freedom of action likewise limits the extent to which contracts with a utility will be recognized when the public need necessitates a partial or total annulment. The duty of the utility to subordinate its right of control over rates in the interest of public welfare is balanced by a corresponding duty on the part of individuals contracting with such utility to subordinate their rights of contract to the same public welfare. The police power of the State is impartial between utility and contractors, requiring both to surrender rights for the general weal.

84 W.Va. at 676-677.

Recently, our Court has had the occasion to review several other actions of the Public Service Commission, which particularly deal with our exclusion of certain expenses from a company's cost of service. In *Lumberport-Shinnston v. Public Service Commission*, ______ W.Va. ______, 271 S.E.2d 438 (1980), our Court upheld actions of this Commission limiting bonuses to employees of Lumberport-Shinnston Gas Company and reducing the salary of the chief executive officer of the Company from $40,000 per year to no more than $20,000 until a large outstanding debt had been paid. The Court stated that the general direction of modern authority is that the Commission should be empowered to remedy unreasonable and excessive salaries and it was in that light that the Court interpreted W.Va. Code §24-2-7. 271 S.E.2d at p. 443. While the Court recognized that the Public Service Commission is not to be seen as a super board of directors for public utility companies of this State, the Court also recognized that our function is to regulate and disapprove any dishonest or clearly inefficient conduct and practice by the utility, quoting from the *United Fuel Gas Company v. Public Ser-*

vice Commission, 154 W.Va. 221, 243, 174 S.E.2d 304, 317 (1969).

Most recently, in *The Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission of West Virginia*, Slip Opinion No. 15424, March 4, 1982, our Court upheld a decision by this Commission which excluded from the rate base of The Chesapeake and Potomac Telephone Company an amount representing excess profits which this Commission determined had been made by Western Electric in its sales of telecommunications equipment to C&P. At Syllabus pt. 7 of that decision, our Court states:

> Where the evidence discloses that a utility has purchased the bulk of its equipment from an affiliated manufacturer, and that as a result of the affiliation the manufacturer enjoys the unique position of market power which renders a comparison of its prices and profits with those of general trade manufacturers inadequate as a measure of the reasonableness of its charges, the failure of the utility to provide additional evidence of reasonableness may be relied upon by the public service commission as a basis for disallowing from the utility's rate base those portions of the charges which represent a return to the affiliated manufacturer greater than that allowed the utility itself.

Indeed, in that case, C&P itself did not contend that this Commission had abused or exceeded our statutory authority in excluding from its rate base amounts representing what we considered to be excess profits earned by Western Electric on its sale of telecommunications equipment to C&P.

As a result of all of the above-cited statutory and case authorities, this Commission is firmly of the opinion that we have sufficient authority under West Virginia State Law to reprice the volumes of SNG purchased by Columbia

from CLNG and to disalllow the inclusion of a portion of those costs in Columbia's cost of service for its West Virginia jurisdictional business.

5. Deprivation of Full Cost Recovery Would Constitute a Denial of Procedural Due Process

Columbia argues that it was not permitted to address the issues of modification or abrogation of the SNG contract or repricing of SNG volumes in the original proceedings held in this case and, therefore, Commission action repricing the SNG volumes constitutes a denial of procedural due process to Columbia. The Commission is of the opinion that our actions and orders throughout the history of this case have presented Columbia with several opportunities at which it could present testimony, evidence and argument on the appropriateness of the cost of the SNG and its inclusion in Columbia's cost of service in the case.

After the initiation of this case on August 1, 1980, this Commission entered an order on August 27, 1980, setting this matter for hearing and setting forth two issues which were to be addressed by the parties in this case: (1) the need for SNG based upon the most recent gas supply/demand data; and (2) considering recent communications from Columbia to the Commission, the extent to which SNG and LNG can be replaced by other supplies of gas. Columbia was also ordered to present detailed evidence relating to the reasonableness of the proposed purchased gas costs in general. Hearings were held initially on October 7, 1980 and continued through October 8, 1980. The case was further set for oral argument to be held on October 23, 1980, and continued on October 24 and 28, 1980, at which hearings parties were also permitted to present evidentiary testimony. Apart from the original briefs which were scheduled to be filed in October of 1980, further briefing was requested by the Commission in which briefs parties could address at length all the arguments which had been

raised by the various parties. On October 31, 1980, the Commission entered an interim order in the case approving an interim purchased gas cost for Columbia to be effective for all gas supplied on and after November 1, 1980, *subject to modification as a result of any subsequent decision regarding the cost of SNG and its inclusion in Columbia's cost of purchased gas.*

After the entry of our final order in Case No. 80-336-G-30C, as a result of a petition for rehearing and reargument filed by Columbia to our order and a premature appeal by Columbia to the Supreme Court of Appeals of West Virginia, on December 7, 1981, the Commission entered an order granting a stay of the October 31, 1981, order in so far as SNG costs were repriced to reflect the average level of natural gas costs until the Commission finally disposed of Columbia's petition for rehearing. On December 18, 1981, the Commission entered an order granting a hearing in this case and consolidating it with Case No. 81-366-G-30C. On January 20, 1982, hearings began on the consolidated cases and concluded on February 8, 1982. Parties have subsequently filed further briefs on the issue of SNG and oral argument was held on the consolidated cases on April 19, 1982.

The above procedural history of this case indicates beyond any doubt that Columbia has been granted procedural due process in this case. If there was any doubt that the initial phase of this case denied certain due process rights to Columbia, those questions were eliminated by our granting of the petition for rehearing and subsequent hearings in this case.

6. Deprivation of Full Cost Recovery Would Result in Columbia Having an Inability to Maintain its Financial Integrity, to Attract Necessary Capital, and to Fairly Compensate Investors for the Risk They Have Assumed

Columbia's argument in this regard asserts that by repricing the SNG volumes to be included in Columbia's cost of service, this Commission is violating the tests established for just and reasonable rates by the United States Supreme Court in *Federal Power Commission v. Hope Natural Gas Company* 320 U.S. 591 (1944) and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). Along with this argument, during the course of the hearing in this case, Columbia has raised the argument that repricing of the SNG volumes will result in an unconstitutional confiscation of property by the Commission. As we consider these two arguments to be intimately related, we will consolidate their discussion for the purposes of this order. We are of the opinion that our decision to reprice the SNG volumes does not violate the test set forth by the United States Supreme Court for just and reasonable rates and does not result in an unlawful confiscation of property by this Commission.

As we stated in our final order in Case No. 80-336-G-30C, our decision to reprice the SNG volumes will undoubtedly result in a reduction of Columbia's achieved rate of return; however, we do not believe that this necessarily means that we have violated the standards set forth by the United States Supreme Court in the *Hope*[3] and *Permian Basin*[4] cases.

---

[3] In the *Hope* case, at page 603, the United States Supreme Court enunciated the following standard:

> "The ratemaking process under the *Act*, i.e., the fixing of 'just and reasonable' rates, involves the balancing of the investor and the consumer interests. Thus, we stated in the *Natural Gas Pipeline Company* case that 'regulation does not ensure that the business shall produce net revenues'. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.

We are of the opinion that our discussion of this issue in our final order in Case No. 80-336-G-30C presents a reasoned justification for our decision to reprice the SNG, even in light of the *Hope* and *Permian Basin* standards, and bears repeating here.

> We are firmly convinced that these two landmark decisions operate as the most reasonable standards for review of rate determinations under normal circumstances. However, they are inadequate in a situation such as the one facing the Commission in this case. These standards should not and must not be used as mechanisms which allow companies to avoid the consequences of their own

---

These include service on the debt and dividends on the stock. By that standard, the return to the equity owner should be commensurate with returns on investments and other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract captial." (Citations are omitted.)

[4] In the *Permian Basin* case, at pages 791-792, the United States Supreme Court adopted the following standard for review of rate orders:

> It follows that the responsibilities of a reviewing court are essentially three. First, it must determine whether the Commission's order, viewed in light of the relevant facts of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, *the court must determine whether the order may reasonably be expected to maintain financial integrity attract necessary capital, and fairly compensate investors for the risks they have assumed and yet provide appropriate protection for the relevant public interest, both existing and foreseeable.* (Emphasis added.)

unreasonable actions. Reason dictates that a company must not be permitted to take an action that violates state or federal law and which also results ultimately in the incurrence of unreasonable and unnecessary expenses and then to come before this Commission or a reviewing court, hiding behind the veil of inadequate rate of return and thus avoid the responsibility for those actions. Indeed, the United States Supreme Court, in the *Hope* case, recognized that there would be situations where a company was entitled to more or less than the just rate of return, although the Court did not address the issue substantively (see *Hope* 320 U.S. at page 603). We believe the *Hope* and *Permian Basin* tests, in conjunction with our statutory mandate to ensure fair and prompt regulation of public utilities in the interest of the using and consuming public[5], to appraise and balance the interests of the utilities[6] and to ensure that rates are just and reasonable,[7] not only permit but also require that unjust and reasonable expenses be disallowed even if such disallowance results in the utility's earning an otherwise inadequate rate of return.

In the *Permian Basin* cases, the United States Supreme Court recognized that regulatory bodies are not limited to the consideration of only one standard, saying:

> (R)atemaking agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates "to make the pragmatic adjustments which may

---

[5] W.Va. Code §24-1-1(a)(1)
[6] W.Va. Code §24-1-1(b)
[7] W.Va. Code §24-1-1(a)(4)

> be called for by particular circumstances."
> (*Permian Basin* 390 U.S. at pages 776-777).

(Case No. 80-336-G-30C, Final Order at pages 8-9.)

Additionally, with regard to the impairment of the financial integrity of Columbia Gas of West Virginia, Inc., as a result of our repricing of the SNG, the Commission is of the opinion that financial integrity for ratemaking purposes must be based upon a company's just and reasonable revenues and operating expenses. For example, in reaching an end result analysis at the conclusion of a general rate case, the revenues, operating expenses and net income figures which we derive in order to make the requisite coverage calculations to determine whether or not the result we have reached in a general rate case is appropriate, those numbers are based upon the Commission's determinations of just and reasonable expenses, based upon the evidence in the case, rather than the amounts which the company may actually have incurred or set forth in its Rule 42 exhibit. On the basis of such an analysis, Columbia's financial integrity has not been impaired, since the expenses for purchased gas costs which would be included in such an analysis are those expenses which we have determined to be just and reasonable.

In an early United States Supreme Court case the Court recognized that a company may not incur exorbitant or unreasonable expenses which eat into a company's earnings and then claim confiscation of property. In *Chicago and Grand Trunk Railway Company v Wellman*, 143 U.S. 339 (1892) the Court stated at page 346:

> While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant or unreasonable salaries, or in some other im-

> proper way, transfer its earnigns into what it is pleased to call "operating expenses".

The Commission is firmly convinced that our decision does not violate either the letter or the spirit of the *Hope* or *Permian Basin* tests set forth previously in this order. Indeed, our interpretation of those cases and our decision to reprice the SNG represent the only reasonable decisions that a regulatory agency can make. If Columbia is correct in its interpretation and assertion that our decision to reprice the SNG violates the *Hope* and *Permian Basin* tests, then any regulated utility company could have any wasteful or incompetent practices or could incur any unreasonable or exorbitant expenses and require its customers to subsidize those unreasonable practices and expenses.

7. Deprivation of Full Cost Recovery Violates West Virginia Code §24-2-3, Which Prohibits Retroactive Changes in Utility Rates

Columbia argues that the basis for Rule 30-C is found in W.Va. Code §24-2-3, which prohibits retroactive changes in rates and Columbia further alleges that our decision to reprice the SNG in Case No. 80-336-G-30C constitutes such a retroactive change of rates and thus is invalid. The Commission is of the opinion that this argument is erroneous and must fail for several reasons. First, the adjustment which this Commission will make to Columbia's rates to reflect our repricing of the SNG volumes will be made through the over and under-recovery mechanisms of Rule 30-C itself, on a *prospective* basis only, although we will be reducing prospectively Columbia's rates to reflect its past over-recoveries of the unreasonable full SNG cost. Such a prospective reduction in rates has been specifically approved by the Supreme Court of Appeals of West Virginia in *Virginia Electric and Power Company v. Public Service Commission,* ______W.Va.______, 248 S.E.2d 322, at

where the Court stated:

> W.Va. Code §24-2-3 (1923) authorizes only prospective and not retroactive changes in a utility's rate structure; however, the Public Service Commission may modify tariff rates prospectively to offset past overcharges or under charges by the utility to ensure an average fair rate of return—neither more nor less.

The Commission has not required Columbia to make refunds of the over collection of SNG costs and we will not do so in this case. We are adjusting prospectively Columbia's future purchased gas costs to reflect the overcollection of purchased gas costs in the past, which was specifically authorized in *VEPCO, supra.* Thus, it is obvious that our decision to reprice the SNG is an adjustment which is *prospective* in nature only, not retroactive as alleged by Columbia.

The Commission is further of the opinion that Columbia is incorrect with regard to its assertion that Rule 30-C has its statutory basis in W.Va. Code §24-2-3. As we stated in *Wheeling Electric Company,* Case No. 9312 (Reopened), Commission order entered on August 18, 1981, our accelerated rate proceedings, such as Rule 30-C and Rule 30-B, find their statutory basis in W.Va. Code §24-2-4a, which proceedings are utility-initiated proceedings. The Rule 30-C case which is at issue in this proceeding was initiated by Columbia Gas of West Virginia, Inc. In a Rule 30-C proceeding, the burden is upon the company to justify the reasonableness of its alleged purchased gas expenses and to present evidence and testimony in support thereof. The SNG volumes are part of the purchased gas volumes which Columbia attempted to include in its purchased gas adjustment in this case. There can be no claim that this proceeding was a Commission initiated proceeding, pursuant to W.Va. Code §24-2-3.

Columbia bases its entire allegation that the rule 30-C proceeding arises out of W.Va. Code §24-2-3 upon a statement contained in the Commission's interim order in this case, at page 3. That statement was to the effect that our findings of fact and conclusions of law in the case formed a proper basis for a just and reasonable purchased gas cost all pursuant to W.Va. Code §24-2-3. However, Columbia is mistaken in its interpretation of that language. In citing W.Va. Code §24-2-3, the Commission was utilizing its broad authority to review all rates and charges of a public utility subject to our jurisdiction, which general authority is further implemented in company-initiated rate proceedings by the additional authority contained in W.Va. Code §24-2-4a. In *United Gas Company v. Mobile Gas Corporation,* 350 U.S. 332 (1956), the United States Supreme Court discussed the provisions of the Natural Gas Act which are analogous to W.Va. Code §§24-2-3 and 24-2-4a. In that case, the Court recognized that §5(a) of the *Act* (which is analogous to W.Va. Code §24-2-3, in that it authorizes the F.P.C. to set aside and modify any rate which it determines, after hearing, to be unjust, unreasonable, unduly discriminatory or preferential) is neither a "rate-making" nor a "rate-changing" procedure, but is simply the power to review all the rates of a natural gas company, whether long-established or newly changed, but which is further implemented by §4(e) of the Act (which is analogous to W.Va. Code §24-2-4a) whenever a company files a new rate change with the Commission. 350 U.S. at 341. The Commission has frequently cited that broad authority in orders in many different proceedings, including general rate cases filed pursuant to W.Va. Code §24-2-4. See, for example, *The Chesapeake and Potomac Telephone Company of West Virginia,* Case No. 79-162-T-42T, Interim Order, October 12, 1979, p. 12; *Monongahela Power Company,* Case No. 9665, Final Order, December 21, 1979, p. 22; *The Chesapeake and Potomac Telephone Company,* Case No. 80-182-T-42T, Interim Order, October 2, 1980, p. 14.

As we stated previously, however, since the adjustment to reflect the repricing of the SNG is prospective in nature only, there can be no allegation that our decision violates the prohibition against retroactive ratemaking contained in W.Va. Code §24-2-3.

8. Deprivation of Full Cost Recovery Would Constitute Discriminatory Regulation

Columbia has raised the argument that this Commission has denied Columbia equal protection of the law by repricing the SNG purchased by Columbia from CLNG while permitting other gas companies who purchase SNG from CLNG to recover their full gas costs. Columbia pointed out that at least three purchasers of SNG from CLNG, other than Columbia, have been allowed to increase their rates in Rule 30-C proceedings in 1980 and 1981 and Columbia further pointed out that in each of those cases there had been no hearing and no repricing of the purchased SNG. These Companies are Bluefield Gas Company, Blacksville Oil & Gas Company and Shenandoah Gas Company. While we agree that these three Companies purchased SNG from CLNG and that their purchases of SNG have not been repriced to average pipeline gas cost levels, we do not agree that this has denied Columbia equal protection of the law. As the Company has pointed out, the equal protection clauses of the Federal and State Constitutions require like treatment of all persons similarly situated. *Tweel v. West Virginia Racing Commission,* 138 W.Va. 531, 539, 76 S.E.2d 874 (1953); *Commonwealth v. Frost,* 172 S.W. 2d 905 at 909 (Ky., 1943). By the same token however, as has been pointed out by the United States District Court for the Southern District of West Virginia, equal protection of the laws does not require identical treatment among those similarly situated, but it does require that arbitrary or capricious distinctions not be made *Milnot Company v. Douglas,* 452 F. Supp. 505, 508 (S.D. W.Va. 1978).

The Commission is of the opinion that it is ludicrous to assert that Columbia Gas of West Virginia, Inc., is similarly situated to Bluefield Gas Company, Blacksville Oil & Gas Company or Shenandoah Gas Company. Columbia is several times larger than all three of the other corporations put together. Thus, size alone requires different treatment of Columbia than would be accorded to the other three companies. Also, Columbia is the only Company which is affiliated with the supplier of the SNG. Additionally, unlike these other three very small gas companies, Columbia services several of the largest industries and employers in the State, including the Weirton Steel Division of National Steel Corporation, which when operating at normal capacity is the largest single employer in the State of West Virginia and the largest single taxpayer. Other major industrial corporations served by Columbia Gas of West Virginia, Inc., include the Goodyear Tire and Rubber Company, Fostoria Glass Company, Diamond Shamrock Corporation, Globe Refactories, Inc., Crescent Glass Company, Monsanto Company, Homer Laughlin China Company, and Chattanooga Glass Company, all of which corporations appeared as Industrial Intervenors in the instant cases. The volume of gas delivered and sold by Columbia to its West Virginia jurisdictional customers is so far in excess of the combined total of gas sold and delivered by the other three companies as to render any assertion that Columbia is similarly situated to these companies patently unreasonable.

Additionally, we know of no State or Federal requirement which would require this Commission to join every gas company or public utility company to every proceeding before this Commission whenever we sought to investigate an issue which we had not previously investigated or when we chose to revise or change a past Commission decision on a given issue. The gist of Columbia's argument is that any time this Commission seeks to investigate a particular issue or change its position on an issue, the Commission

must join every company which might be affected by that change of Commission policy before we may enter an order in the initial case. This would require the Commission to join every other gas company in the State of West Virginia to every Columbia Gas of West Virginia proceeding before changing our position with regard to any issue which affects Columbia and those other companies. This position is unreasonable and obviously incorrect.

Further, this Commission has recognized in previous cases that Commission Staff resources, personnel and time are severely limited in comparison to the major corporations which serve West Virginia public utility customers. *See, The Chesapeake and Potomac Telephone Company of West Virginia,* Case No. 81-315-T-42T, Final Order, May 7, 1982, at page 58. Given such constraints upon the ability of the Commission Staff to audit and investigate every public utility subject to our jurisdiction, such resources must of necessity be apportioned according to the impact that the Staff investigation and Commission decision will have upon the greatest body of ratepayers in the State. Once the initial decision having the greatest impact on West Virginia ratepayers is made, the Commission and its Staff may then proceed to apply the ruling in that initial case to any other companies in the State subject to our jurisdiction which may be affected by that issue. That is how we have proceeded in this case. Indeed, in the next round of 30-C cases which are filed by gas companies subject to our jurisdiction, we intend to investigate the reasonableness of the inclusion of the cost of SNG purchased by any other gas company subject to our jurisdiction which purchased SNG from CLNG, using the vast information which we have gained on that issue in this case as an aid in enabling us to address the same issue with regard to any other company which may purchase SNG from CLNG.

9. Incurred Cost is the Appropriate Pricing Standard to Use in Order to Determine the Reasonableness of the Cost of the SNG

Columbia argues that even if the Commission can overcome all legal and statutory challenges raised by Columbia to our authority to reprice the SNG volumes, the appropriate pricing standard to be used in determining the reasonableness of the SNG cost is the incurred cost of the SNG, rather than the cost of comparable natural gas supplies or alternate fuels as advocated by Commission Staff. Once again, we disagree with the interpretation asserted by Columbia.

The fallacy in Columbia's reasoning can be easily demonstrated by looking to the general rate case procedure at this Commission under our statutory responsibility to establish just and reasonable rates for Columbia. If the incurred cost of the good or service was the appropriate standard to be used in determining whether or not that expense was reasonable, there would be relatively little need for a Staff Auditing Division, since all of the Staff Auditing Division would do would be to verify that the expenses a company attempted to include in its cost of service were actually incurred by the company, rather than whether the expenses were reasonable and necessary operating expenses, which has been the traditional standard at this Commission. In every general rate case or accelerated rate proceeding filed with this Commission, the Staff Auditing Division undertakes an extensive audit of the Company's books and records, the Company and Staff present extensive testimony on the reasonableness of the Company's expenses and revenues and the Commission renders its decision based upon the testimony and evidence contained in the record with regard to the reasonableness of the various expenses at issue in the case. If Columbia's pricing standard was indeed the reasonable standard, this Commission could never disallow any expense actually incurred by a public utility company, even if that expense was unreasonable, was not a necessary operating expense for the Company's public utility business in this State and even if it was an expense which should by rights be borne

by the shareholders of the Company. Since this Commission's authority to disallow expenses incurred by a company for ratemaking purposes has been upheld by the Supreme Court of Appeals of West Virginia since the very inception of this Commission, Columbia's argument that incurred costs satisfies (sic) the reasonableness standard for the price of SNG is a completely inaccurate statement of public utility law in West Virginia and in this Country. *The Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission of West Virginia*, Slip Opinion No. 15424, March 4, 1982, Syllabus Point 7; *Lumberport-Shinnston Gas Company v. Public Service Commission of West Virginia*, _____W.Va. _____, 271 S.E. 2d 438 (1980) at pages 442-443; *General Telephone Company of Up-State New York, Inc. v. Lundy*, 17 NY 2d 373, 218 N.E. 2d 274 (1966); *Pacific Telephone and Telegraph Company v. Public Utility Commission*, 215 P. 2d 441 (Cal., 1950).

Columbia also asserts that the standards suggested by Commission Staff for determining the reasonableness of the SNG cost is (sic) invalid. Commission Staff looked to the price of alternate supplies of natural gas that could be available to Columbia in this area to serve its West Virginia customers in reaching its conclusion that the cost of the SNG was unreasonable given the current supply situation, that is, a comparable goods and services pricing standard to determine whether or not the SNG was priced at a reasonable rate. We disagree with Columbia's assertion that this standard is an invalid one in determining whether or not the price of the SNG is reasonable and should be included within Columbia's cost of service for its West Virginia jurisdictional customers. The Supreme Court of Appeals of West Virginia has recently upheld this Commission's use of a comparable goods and services pricing standard in *The Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission, supra.* In that case, this Commission had utilized the prices

of comparable goods and services to determine whether or not prices paid by C&P to its affiliated supplier, Western Electric, were reasonable or whether they contained excess profits to Western Electric. The Commission determined that the prices paid by C&P to Western Electric did in fact contain excess profits and we reduced C&P's rate base by an amount equal to those excess profits. Although the Court disallowed a portion of our adjustment on the basis that it was inequitable at this point to adjust rate base for equipment that may have been purchased as long ago as 1959, the Court upheld this Commission's authority to make an adjustment to C&P's rate base to reflect those excess profits paid to Western Electric, and which excess profits were determined on a comparable goods and services standard basis. Therefore, we are of the opinion that Columbia's assertion that a comparable goods and services standard for determining reasonableness of prices for commodities is invalid must be determined to be incorrect, in light of that recent Supreme Court of Appeals of West Virginia decision.

D. The Need for SNG

1. Case No. 80-336-30C

As we stated in our final order in this case, dated October 30, 1981, in analyzing the question of the need for SNG, we must consider the requirements of Columbia's customers and the available supply from CGTC. At the time we issued our final order in this case, the following information was available to this Commission: (a) For the 1981 contract year[8], CGTC was projecting excess gas supplies of 56,626,200 Mcf, which is the difference between its projected total requirements of 1,541,634,300 Mcf and gas

[8] A contract year for both Columbia and CGTC runs from November 1 through October 31, therefore, contract year 1981 represents the 12 months ending October 31, 1981; contract year 1982 represents the 12 months ending October 31, 1982, and so forth.

projected total requirements of 1,541,634,300 Mcf and gas available of 1,598,260,500 Mcf; and (b) CGTC could meet the entire requirements of its customers for contract year 1981 even if the total SNG supplies of 75.6 Bcf were completely eliminated from CGTC's calculations, and still retain a 2.5 Bcf surplus. During the course of the consolidated hearings, it was learned that in the June 1981 estimate of CGTC for contract year 1981, which includes five months of actual data and seven months of estimated data, CGTC was projecting an excess gas supply of 165,116,500 Mcf, approximately three times the surplus estimated during the original hearings in this case (Staff Ex. 1, First Set of Interrogatories, Data Response Ex. 1 (a)). This estimate reflected a reduction in total requirements and an increase in total available supply. The June 1981 estimate of CGTC estimated SNG volumes for the contract year 1981 of 80,501,968 Mcf. Therefore, if there were no available supplies of SNG by which CGTC could reduce the amount of gas it needed to supply its customers, CGTC would still have an excess for the 1981 contract year of almost 85 million Mcf (*Id;* Staff EX. 1A, pp 2-3). Additionally, it is clear that CGTC has gas supplies available to it during the winter heating season which could be used to replace the SNG volumes. As demonstrated in Staff Ex. 1A, CGTC has the capacity to meet gas requirements resulting from the absence of SNG through additional withdrawals from storage (Staff Ex. 1A, pp. 4-5). During the heating season in contract year 1981, CGTC withdrew approximately 211 million Mcf storage, with total withdrawals from storage for the 1981 contract year totaling 215 million Mcf (Staff Ex. 1A, p. 5). The 215 million Mcf total withdrawal figure is substantially below the 269 million Mcf maximum annual storage turnover capability which is possessed by CGTC (Staff Ex. 1A, p. 5-6).

Commission Staff also demonstrated that for the

period July 1980 through October 1980, CGTC turned back almost 84 million Mcf from pipelines, local producers and company production, which could easily have offset the volumes of SNG that were taken during the subsequent heating season (Staff Ex. 1A, p. 6). Further, for the period February 1981 through August 1981, CGTC turned back 107,733,000 Mcf of pipeline and local gas supplies *(Id.)*.

The evidence presented during the consolidated hearings, held in January of 1982, in these cases is even more convincing than the evidence presented during the initial hearings in this case that CGTC has sufficient excess supplies of natural gas available to it to make up for any loss of SNG volumes and that Columbia Gas of West Virginia, Inc., could purchase this gas from CGTC in order to supply its own customers, thus rendering the SNG volumes unnecessary to serve customers of Columbia Gas of West Virginia, Inc.Therefore, this Commission is of the opinion that our decision in our Final Order in this case should be reaffirmed in this order, given the convincing nature of the evidence presented to us. As we stated in our Final Order in this case, it is unreasonable to include the cost per Mcf for SNG in Columbia's cost of purchased gas when that cost of SNG is considerably higher than the average CGTC commodity rate and when that high priced gas is not needed to serve Columbia Gas of West Virginia, Inc.'s customers. To make any other decision would be to require West Virginia rate payers to pay rates in excess of just and reasonable rates for service supplied to them from Columbia Gas of West Virginia, Inc.

During this proceeding, Columbia has not disputed the accuracy of the mathematical calculations set forth by Commission Staff, but has chosen instead to rely upon its argument that failure to allow full cost recovery of the SNG would result in severe financial harm to Columbia

Gas of West Virginia, Inc. and that it is inequitable for this Commission to reprice the volumes of SNG when we had previously allowed full cost recovery. The Commission is of the opinion that we have adequately addressed both of these issues previously in this order; however, we would state that we would look with more sympathy upon Columbia's arguments if Columbia had taken some steps to help itself, particularly in light of this Commission's previous determinations that it had the authority to adjust the amount of the cost of SNG which we would include in Columbia's cost of service and our actions in past cases to adjust that cost. In our opinion, a prudent, non-affiliated company would have attempted to renegotiate the SNG contract with CLNG or would have attempted to sell the SNG to a third party, either through an off-system sale or through a private contract with an industrial company willing to pay a higher price for an assured supply of natural gas, or would have actively urged CLNG to renegotiate the feedstock contract with Dome Petroleum CLNG's supplier. However, Columbia has done none of these things.

Commission Staff pointed out two slight adjustments which must be made to the SNG adjustment made by us in the Final order in this case on October 30, 1981. As Staff has pointed out, it is inappropriate to price SNG volumes at CGTC's average rate, plus a separate transportation charge on the SNG volumes, since, if Columbia were buying additional volumes from CGTC, there would not be an additional increment for transportation over and above the average CGTC rate. Therefore, the total SNG cost, including the synthetic gas exchange service, should be adjusted to the average CGTC rate (see Staff Ex. 1A, pp. 7-8). Additionaly, our SNG adjustment should be based upon actual SNG volumes received by Columbia Gas of West Virginia, Inc., rather than estimated volumes of SNG received prior to the production cutback of SNG (Staff Ex. 1A, pp. 8-9). We are of the opinion that these two

adjustments are reasonable and we will make them.

Thus, as stated previously in this section, we affirm our decision in our Final Order in Case No. 80-336-G-30C to reprice the cost of SNG to the average CGTC commodity rate, with the two adjustments previously discussed in this section.

2. Case No. 81-366-G-30C

The evidence in this case indicates that the March 1981 Bluebook estimate of Columbia Gas of West Virginia, Inc., for the contract year 1982 indicated that Columbia had total requirements of 74,114,300 Mcf, representing 70,144,100 Mcf for retail sales, with the remainder consisting of wholesale sales, company use, free and unaccounted for gas (Staff Ex. 1, Second Set of Interrogatories, Response No. 3). These estimates of Columbia Gas of West Virginia, Inc., are utilized by CGTC in planning its June 1981 estimates and would result in CGTC planning to deliver gas volumes sufficient to meet 74,114,300 Mcf of requirements, less the SNG volumes available to Columbia of 4,954,100 Mcf[9] (Tr. 1/22/82, p. 198). In Columbia's original filing in this proceeding as amended, Columbia estimated total gas requirements of 72,314,200 Mcf, or 1,800,100 Mcf less than the estimates which CGTC was prepared to supply (Columbia Ex. 2 Schedule 2). During these hearings, Columbia further reduced its requirements by another 3 million Mcf, as a result of an industrial customer switching from natural gas to fuel oil, with a resulting total gas requirement of 69,314,200 Mcf, or 4,800,100 Mcf less than its initial requirements estimate, and an estimated sales figure of 66,923,900 Mcf (Columbia Ex. 2, Schedule No. 2, Sheet 2 of 2, Revised 1/25/82). Thus, based on the March

[9] Under the SNG contract between Columbia Gas of West Virginia, Inc., and CLNG, Columbia is obligated to take 4,954,100 Mcf of SNG volumes.

1981 estimate, Columbia Gas Transmission Corporation planned to deliver gas volumes sufficient to meet 69,160,200 Mcf of Columbia's requirements, or only 154,000 Mcf less that Columbia's total gas requirements in this case. Given the tremendous gas supplies available to CGTC as detailed previously in this order and below, it is clear that CGTC could supply all of Columbia's requirements, even if Columbia has no SNG volumes.

The evidence presented in this case further demonstrates that as was true for contract year 1981, CGTC has large excess supplies of natural gas available to it for contract years 1982, 1983 and 1984 (Staff Ex. 1, First Set of Interrogatories, Response to 1(b) and Staff Ex. 6, Response 1(4)-2). These excess supplies range from 138,876,000 Mcf for the 1982 contract year to 188,806,000 Mcf for the 1984 contract year. Thus, obviously the 154,000 Mcf shortfall between the amount of gas CTGC had planned to supply to Columbia and Columbia's actual requirements could easily be made up out of these large excess supplies of natural gas available to CGTC. Additionally, although Columbia projected total gas requirements of only 69,314,200 Mcf for contract year 1982, under three service agreements between Columbia and CGTC, Columbia has the right to demand 127,327,215 Mcf on an annual basis, or almost twice Columbia's projected total gas requirements for contract year 1982 (Staff Ex. 1, First Set of Interrogatories, Responses 10(b)(1), (2) and (3)). Therefore, Columbia would have the right to demand that CGTC supply it with sufficient gas to make up the 154,000 Mcf shortfall discussed previously.

Additionally, as noted previously in this order, CGTC has substantial annual storage turnover capability which has not been fully utilized during the years which this case has been before the Commission (Staff Ex. 1A, pp. 5-6).

These storage volumes could also be utilized to supply Columbia with the additional volumes needed to make up its total gas requirements. Further, CGTC's storage capabilities would not be impaired in any way by utilizing storage capacity to supply Columbia with these additional volumes of natural gas since CGTC has consistently been turning back substantial supplies of natural gas which would be available to it from pipelines, local producers and company production, and which supplies could be used to restore the amounts of natural gas held in storage by CGTC to maximum amounts (Staff Ex. 1, First Set of Interrogatories, Response 6(a), Revised Schedule).

The evidence presented in this case is undisputable that Columbia Gas Transmission Corporation does not need the SNG volumes in order to insure that its customers are adequately supplied with natural gas and further that Columbia Gas of West Virginia, Inc., does not need these supplies of SNG to adequately supply its own customers, given its right to demand 127.3 Bcf annually from CGTC and its total gas requirements for this contract year of 69.3 Bcf. Therefore, the Commission is of the opinion that the evidence presented in this case substantiates and revalidates our decision to reprice the volumes of SNG, since those volumes are not necessary to supply Columbia Gas of West Virginia, Inc.'s customers and are priced considerably higher than other historical gas supplies available to Columbia to supply its customers.[10]

As we did with regard to the SNG adjustment in Case No. 80-336-G-300, we will adjust the total SNG costs, including the synthetic gas exchange service, to the average

---

[10] The total cost of SNG before consideration of Business and Occupation Taxes is \$5.952 per mcf, while the average commodity rate which must be paid by Columbia to CGTC for the balance of its gas supply is \$3.853 per Mcf (Columbia Ex. 2, Schedule No. 2, Sheet 2 of 2, Revised 1/25/82).

CGTC rate and we will apply the average CGTC rate to only those volumes of SNG which have been delivered or allocated to Columbia Gas of West Virginia, Inc.

II. The Proper Treatment of Over and Under-Recoveries of Gas Costs

In its revised filing in this case, Columbia has requested Commission approval to include an under-recovery in the amount of $1,571,591 in its purchased gas costs to be recovered in this case (Columbia Ex. 2, Schedule 2, Sheet 1 of 2). While Commission Staff agrees that Columbia's request should be approved (Staff Ex. 4, p. 4), Staff has raised two concerns with regard to this issue. First, Staff has raised concerns regarding the methodology used to reflect the under-recovery and, second, Staff has pointed out that if the Commission reaffirms its decision to reprice SNG, which it has done, a cumulative over-recovery of gas costs will exist, rather than the $1.5 million under-recovery.

Staff witness Ellis presented testimony which indicates that when the under-recovery balance is included in the total purchased gas costs and those costs are spread over projected sales, the under-recovered amount is spread equally per Mcf to all customers over the next 12 months, which is typical of the treatment of over or under-recoveries (Staff Ex. 4, p. 4). However, according to Staff witness Ellis, this method results in general service customers paying more than their fair share of Columbia's gas costs, as a result of: (1) the selection of November 1, which is the beginning of the heating season, as the starting date for the purchased gas costs estimates and recoveries; (2) increasing gas costs; (3) variations in monthly loads reflected in some but not all rate schedules; (4) the use of an annual purchased gas cost period; and (5) the averaging of over and under-recoveries (Staff Ex. 4, pp. 4-5). As a result of all of these factors, Rate Schedules LV-1

and LV-2 are not paying their full share of the under-recovery amounts, while the General Service Rate Schedule, which comprises residential service, is paying more than its share of the under-recovery amounts, and concomitantly receiving less than its share of the benefit of over-recovery credits reflected in purchased gas costs (Staff Ex. 4, pp. 8-10). In order to correct this problem, Staff witness Ellis recommended that the Commission depart from past practice and spread the over or under-recoveries as calculated pursuant to Rule 30-C on a rate schedule basis (Staff Ex. 4, p14).

The Commission is of the opinion that Commission Staff has adequately demonstrated that the current method of calculating over and under-recoveries results in some rate schedules receiving less than their proportionate share of the effects of over or under-recoveries in purchased gas costs, while other rate schedules receive more than their fair share of these same effects. Therefore, we will adopt Staff's proposal to spread the over and under-recoveries of gas costs calculated in this case each month on a rate schedule basis.

With regard to Staff's second concern, the Commission is of the opinion that this is not really an issue which must be addressed by us. We have made our decision to reprice the SNG and we will follow the principles discussed in this order in making that adjustment.

III. The Proper Treatment of Section 107 Gas

As noted previously in this order, CGWV purchases all of its gas from Columbia Gas Transmission Corporation, with the exception of the SNG volumes, which are purchased from CLNG and transported by CGTC. The rate which Columbia pays to CGTC represents an averaging of the cost of all the various volumes of gas included in CGTC's

supply. That is, the price paid by CGTC to its Southwestern pipeline suppliers is different from the rate CGTC pays to Appalachian producers and the rates which CGTC pays for volumes of gas which qualify under various sections of the Natural Gas Policy Act of 1978 differ as well, with the result that the commodity rate paid by Columbia to CGTC for its gas represents an average rate of all of these different volumes. Included within CGTC's supply is what is known as Section 107, or high-cost natural gas.[11]

[11] Title I of the Natural Gas Policy Act of 1978, 92 STAT. 3350, 15 U.S.C. §3301 et. seq., established different ceiling prices for different categories of natural gas. Section 107 of the NGPA established a ceiling price for what was termed high-cost natural gas, which was defined to be gas (1) produced from any well, the surface drilling of which began on or after February 19, 1977 at a depth of more than 15,000 feet; (2) produced from geopressured brine; (3) included natural gas produced from coal seams (4) produced from Devonian shale; and (5) produced under such conditions as the Commission determines should present extraordinary risks or costs. The Commission (Federal Energy Regulatory Commission) was given the authority to prescribe a maximum lawful price which would be applicable to the first sale of any of this high-cost natural gas, which price could exceed the otherwise applicable maximum lawful price to the extent that a special price was necessary to provide reasonable incentives for the production of this gas. Section 121(b) of the NGPA provided that the price of this high-cost natural gas would be deregulated beginning on the effective date of the first incremental pricing rule required under Section 201 of the NGPA, which rule was to be issued by the FERC not later than 12 months after the enactment of this Act, or November 9, 1979. Additionally, on January 1, 1985, pursuant to Section 121(a) of the Act, price ceilings are to be eliminated for new gas (Section 102 gas), new on-shore production well gas from a depth of more than 5,000 feet (Section 103) and gas sold under intrastate contracts in existence as of November 8, 1978, which specify a price of more than $1 for deliveries on December 31, 1984. The FERC issued its incremental pricing rule on November 1, 1979 and from that date the price of this high cost Section 107 natural gas has been deregulated.

For contract year 1982, CGTC has $600,374,000 of Section 107 gas costs, of which $34,882,000 is allocable to Columbia (Staff Ex. DJE-10). This cost reflects an average price per Mcf for the Section 107 gas. The cost of the Section 107 gas from Louisiana has an average price per Mcf of $9.51 and constitutes $555,277,000 of CGT's total Section 107 gas costs (Staff Ex. DJE-9). The average price per Mcf of the Section 107 Columbia Southwest production is $9.89 *(Id.)*. The average price per Mcf for the Section 107 Appalachian purchases is $5.10 per Mcf and the average price per Mcf for the Section 107 Columbia Appalachian production is $5.44 *(Id)*. Commission Staff has recommended an adjustment to Columbia Gas of West Virginia's purchased gas costs in this case to reduce the price of the volumes of the Section 107 gas to the cost of the average 1981-1982 Appalachian purchases, plus a transportation allowance, for a maximum allowable cost of $3.094, which would result in a reduction of gas costs allocable to CGWV of $23,430,000 in this case (Staff Ex. DJE-10).

Commission Staff is advocating this position for several reasons. First, Staff asserts that the price of the Section 107 gas has not been shown to be just and reasonable by either CGTC before FERC or Columbia before this Commission, and points to the fact that the FERC found that CGTC's proposed PGA increase with respect to Section 107 gas purchases may in fact be unjust and unreasonable or otherwise unlawful and allowed the rates to become effective March 1, 1981, but subject to refund. See 14 FERC ¶61,202, at page 61,380. Staff asserts that this Commission has the authority to reprice these Section 107 volumes because the FERC has not acted to determine that the price of that Section 107 gas or CGTC's rate which includes that Section 107 gas is reasonable. Additionally, Staff asserts that Columbia has acted imprudently in purchasing these volumes of gas from CGTC

without attempting to find cheaper supplies of gas and that Columbia has not made a reasonable effort to obtain supplies from cheaper Appalachian production.

Columbia asserts that this Commission has no authority to review the reasonableness of any portion of the CGTC commodity rate, which is exclusively the sole jurisdiction of the FERC and Columbia further asserts that its purchasing practices are reasonable and that purchases from CGTC are necessary to insure that Columbia will have adequate supplies of gas to serve its West Virginia customers. The Commission is of the opinion that Columbia's argument with respect to Federal preemption of the price paid by Columbia to CGTC is correct and that Commission interference in this matter would constitute an impermissible burden on interstate commerce. We do not, however, agree with Columbia's assertion that its purchasing practices have been reasonable and we will address that issue below.

A. The Issue of the Reasonableness of the Price Charged By CGTC to its Customers Has Been Federally Preempted and Commission Interference Would Impermissibly Burden Interstate Commerce

Any determination as to whether or not this Commission may exercise any authority over the rates charged to Columbia by CGTC for natural gas or investigate the reasonableness of any such rate must begin with the transaction itself. There is no disagreement among the parties to this case that the sale of natural gas by CGTC to Columbia is a sale in interstate commerce, with the price for that sale being regulated by the Federal Energy Regulatory Commission, pursuant to its authority under the Natural Gas Act of 1938, 52 STAT. 821, 15 U.S.C. §717 *et seq.* and the Natural Gas Policy Act of 1978, 92 STAT. 3350, 15 U.S.C. §3301 *et seq.* Thus, once again we must make a

determination as to whether Congress, by enacting certain Federal legislation, has forbidden the states to regulate or interfere with this particular area of commerce. *Panhandle Eastern Pipeline Company v. Public Service Commission*, 332 U.S. 495 (1947). The pricing mechanism for the Section 107 gas has been discussed above. Remaining for this Commission is whether or not we are prohibited from going behind the rate established through the NGPA procedure. We are of the opinion that this Commission is prohibited from looking behind the rate established through the NGPA pricing mechanism for the Section 107 gas and that we may not determine that such rate is unreasonable.

Section 601(b)(1)(A) of the NGPA provides that:

> (A) *First Sales*—Subject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—
>
> (i) such amount does not exceed the applicable maximum lawful price established under Title 1 of this Act; or
>
> (ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to Subtitle B of Title 1 of this Act.

As discussed previously in this order, the Section 107 gas which is at issue in this proceeding is no longer subject to a maximum lawful price by virtue of Section 121(b) of the NGPA. As a result, the price of this deregulated Section 107 gas which is at issue in this proceeding is no longer subject to a maximum lawful price by virtue of Section 121(b) of the NGPA. As a result, the price of this deregulated Section 107 gas shall be deemed to be just and reasonable for purposes of Section 4 of the Natural Gas

Act and, pursuant to Section 601(c)(2) of the NGPA, no interstate pipeline company may be denied recovery of any amount paid with respect to the purchase of such natural gas unless the Federal Energy Regulatory Commission determines that the amount paid was excessive due to fraud, abuse or similar grounds.

In *Ray V. Atlantic Richfield Company,* 435 U.S 151 (1978), the United States Supreme Court discussed the inquiries which are to be made in determining whether or not Congress has forbidden the States to regulate certain areas of commerce through the passage of Federal legislation. In that case, the Court stated that one of the legitimate inquiries is whether or not Congress has explicitly or implicitly declared that the States are prohibited from regulating various aspects of the operations with which the particular statute is concerned. 435 U.S. at 157. Quoting from its decision in *Rice v. Santa Fe Elevator Corporation,* 331 U.S. 218 (1947), the Court reiterated that:

> "[The Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose . . "

435 U.S. at 157-158 (citations omitted). The Court went on to state that even if Congress had not completely foreclosed state legislation in an area, the state statute was void to the extent that it conflicted with the valid Federal statute. 435 U.S. at 158. It is clear from the above-cited authorities that in requiring full cost recovery for amounts paid for

purchases of natural gas under the NGPA, unless the Federal Energy Regulatory Commission determined that there had been a showing of fraud, abuse, or similar grounds, Congress has explicitly prohibited the States from regulating or finding unreasonable prices paid for natural gas pursuant to the NGPA. Thus, there is no basis upon which this Commission could adopt the Staff recommendation in this case to reprice the volumes of Section 107 gas contained within the stream of gas purchased from CGTC by Columbia to the average CGTC commodity rate. However, as we intimated above, this determination does not end our inquiry with regard to the reasonableness of Columbia's purchases of gas supplies which include volumes of this high-priced Section 107 gas.

B. Reasonableness of Columbia's Management Practices and Gas Procurement Policies

Even though we have determined that this Commission does not have the authority to pass upon the reasonableness of the rate charged to Columbia by CGTC, this Commission is of the opinion that we have the authority and obligation to investigate the reasonableness of Columbia's purchasing practices with regard to the volumes of natural gas which it buys and its management practices with regard to the operation of the Company. There can be no claim that these lines of inquiry have been foreclosed through Federal preemption or the supremacy clause. Columbia Gas of West Virginia, Inc., is an intrastate natural gas distribution company, which is a public utility subject to this Commission's jurisdiction and subject to the laws of the State of West Virginia. This Commission has been authorized by the Legislature of this State to enforce and regulate the practices, services and rates of public utilities order (sic) to insure fair and prompt regulation of public utilities in the interest of the using and consuming public and to encourage the well-planned development of utility

resources in a manner consistent with State needs and in ways consistent with the productive use of the state's energy resources, such as coal.[12] Additionally, the Public Service Commission has been charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the State's economy and the interests of the utilities subject to our jurisdiction.[13] More particularly, this Commission has been delegated the authority to determine and fix reasonable regulations, practices, acts and services to be followed in the State if we determine that any regulations, practices, acts or services of the public utilities subject to our jurisdiction are unjust, unreasonable, insufficient, or unjustly discriminatory or otherwise in violation of the provisions of Chapter 24 of the West Virginia Code.[14]

Before discussing the evidence in the record detailing the activities of the management of Columbia Gas of West Virginia, Inc., with regard to purchases of natural gas volumes and other activities, it is appropriate for this Commission to detail the background against which this case is being heard and decided. The industrial climate in West Virginia has deteriorated precipitously in the past few years as a result of the continuing economic problems at the Federal level and unremitting cost increases for these industrial companies at the local level. Included within these continually escalating costs are utility costs. The Commission received extensive testimony in this case from representatives of industrial firms and union representatives detailing the problems which were being caused for these industrial companies by continued increases in utility bills, particularly bills for natural gas service.

[12] W. Va. Code §§24-1-1(a)(1) and (3).

[13] W. Va. Code §24-1-1(b).

[14] W. Va. Code §24-2-7(a).

William Auger, assistant to the manager for energy policies of Globe Refractories, Inc., testified with regard to that company's gas costs and its efforts to reduce gas use. Globe's natural gas costs approximate $2.75 million per year, which represents about 25% of Globe's manufacturing costs (Industrial Intervenors' Ex. 3, p. 4). If the total increase requested by Columbia in this case is granted, Globe's annual bill would increase by more than $1 million or close to 38% *(Id.).* According to Mr. Auger, Globe's automation and efficiency have been very nearly maximized, leaving very few avenues open to Globe to reduce its energy costs. According to Mr. Auger, the only thing left for Globe to do is to try to pass those costs on to its customers, who are steel manufacturers. However, due to the problems in the steel industry currently, this avenue threatens the economic viability of Globe Refractories *(Id.)* Mr. Auger also detailed how some of Globe's competitors have moved from West Virginia to Ohio in order to avoid the higher fuel costs charged by Columbia as compared to East Ohio Gas Company *(Id.).* According to Mr. Auger, Globe's competitors in Ohio and Pennsylvania have lower natural gas rates than those which face Globe in West Virginia and Globe is fearful that Columbia's proposed increases will threaten the ability of Globe to compete in the marketplace (Industrial Intervenors' Ex. 3, p. 5).

Joseph M. Wells, Jr., executive vice president and general manager of the Homer Laughlin China Company also presented testimony in this case. According to Mr. Wells, natural gas amounts to 4.5% of his Company's total costs and, since 1978, the price his company pays for gas has increased 84% (Industrial Intervenors' Ex. 6, p. 2). If Columbia receives the entire PGA rate it has requested, Homer Laughlin China Company's gas costs will be approximately $2.4 million for 1982 *(Id.).* According to Mr. Wells, increased gas costs will hinder the ability of the company to remain competitive with other companies in the field (Industrial Intervenors' Ex. 6, p. 3). In November

1981, the Homer Laughlin China Company was operating at 44% of capacity, with 888 employees, as opposed to the production level in 1980 which was at 70% of capacity, with employment standing at 1,200 people (Industrial Intervenors' Ex. 6, p. 1).

E. William Campbell from the Goodyear Tire and Rubber Company also presented testimony in this case. According to Mr. Campbell, employment at Goodyear is down by 200 people over a period of two years (Industrial Intervenors' Ex. 4, p. 1). During the first ten months of 1981, Goodyear consumed approximately $3.3 million worth of natural gas, which represents a significant portion of the costs to convert raw materials into polyester resin, which is the product manufactured at the Goodyear Plant in Point Pleasant (Industrial Intervenors' Ex. 4, p.2). According to Mr. Campbell, Goodyear is seriously concerned that the size of the increases requested by Columbia will affect the plant's ability to compete with plants that benefit from being served by other interstate pipelines *(Id.)*.

Also testifying in this case was Malcolm A. Wilkinson, vice president of purchasing and traffic for the Weirton Steel Division, National Steel Corporation. When operating normally, Weirton employs approximately 12,000 people and is the largest employer in the State, however, currently Weirton is employing only 9,300 people and is operating at a rate of 46% of its capacity (Industrial Intervenors Ex. 2, p. 2). For the first ten months of 1981, Weirton's natural gas purchases totaled $38,600,000, slightly over 3% of its total cost of sales (Industrial Intervenors Ex. 2, pp. 2-3). Weirton is Columbia Gas of West Virginia's largest customer. Weirton Steel has the capability to burn either natural gas or No. 6 fuel oil at several of its installations, and will convert to whichever is the cheapest energy at the time *(Id.)* The combination of natural gas and No. 6 fuel oil furnishes 38% of Weirton's

energy supplies. On November 1, 1981, as a result of an initial interim increase granted to Columbia in this case, the present price of natural gas increased above the cost of No. 6 fuel oil and Weirton minimized its purchases of natural gas and maximized its purchases of No. 6 fuel oil *(Id.)* According to Mr. Wilkinson, if Columbia's requested increase in this case had been in effect during the first ten months of 1981, Weirton's natural gas costs would have increased by $15.7 million (Industrial Intervenors' Ex. 2, pp. 4-5). According to Weirton, that sort of natural gas cost increase cannot be recovered by increasing Weirton's prices in today's market and, according to Mr. Wilkinson, it is doubtful if Weirton could recover those increased costs at all *(Id.)*.

Mr. Wilkinson pointed out the rather anomalous situation that exists today by comparing the fuel oil market and the natural gas market. Weirton purchases its oil through auction, purchasing from the lowest bidder who establishes the market price (Industrial Intervenors' Ex. 2, p. 8). These auctions occur about the first of every month and because of the auction process, the price of fuel oil reflects the actual balance of supply and demand *(Id.)*. Natural gas costs, however, do not reflect the actual supply/demand balance. This can be demonstrated by observing that currently the Columbia Gas System is enjoying a tremendous over-supply of natural gas and at the same time Columbia Gas of West Virginia is attempting to increase its rate for natural gas service to such an extent that it is losing a great deal of its industrial market, even when it has such an over-supply of natural gas (Industrial Intervenors' Ex. 2, p. 9). It can be readily observed that any further increases in the cost of natural gas are going to have an extremely detrimental effect on West Virginia's industrial companies and, thus, this Commission bears a strong obligation to analyze and investigate as fully as possible Columbia's purchasing practices in order to insure that Columbia is doing everything it can to purchase the

cheapest supplies of natural gas available to it. Additionally, the Commission is cognizant of the impact on residential customers which any increases in natural gas costs will have, as reflected in the numerous petitions and letters of protest which are in the file of this case.

Having reviewed the record in this case, the Commission is of the opinion that the evidence indicates that Columbia Gas of West Virginia, Inc., has not been engaging in management practices or purchasing practices which redound to the benefit of West Virginia customers. We are convinced that Columbia Gas of West Virginia, Inc., has engaged in purchasing practices and management practices which are designed to further the interests of and benefit the Columbia Gas System as a whole, rather than Columbia's West Virginia jurisdictional customers.

The record in this case indicates that Columbia has not aggressively looked for supplies of gas other than CGTC gas, which other supplies may be priced at a cheaper rate. Columbia has not inquired into or contested the mix of gas supplied to it by CGTC, objected or inquired with regard to CGTC's procurement practices and has not actively participated in cases before FERC which could result in lower prices charged by CGTC to Columbia and the Transmission Corporation's other customers. The record also demonstrates that Columbia has not performed any price elasticity studies to determine the effects on Columbia's market if gas costs reach a certain level. Further, Columbia has not considered making adjustments to the price of natural gas in order to maximize industrial use of natural gas, which would benefit Columbia, the industrials and Columbia's residential and commercial customers, who benefit from the large volumes taken by the industrial companies. The basis for these determinations will be discussed subsequently.

According to Columbia witness Mentch, while the

Special Studies Section of the Columbia Distribution Companies reviews the PGA filings made by CGTC before FERC, this review is primarily in the mathematical sense, rather than evaluating the purchases, supply mix or anything of that nature (Tr. 1/21/82, p. 81). According to Mr. Mentch, there is no competitive analysis made of price lists proposed to Columbia by CTGC *(Id.)*. Columbia makes no study of the effects of CGTC's filing at FERC with regard to the mix of gas or to the reasonablenesss of the price of certain volumes of gas included in CGTC's filing (Tr. 1/21/82, pp. 82-83). According to Mr. Mentch, the major concern for Columbia should be insuring that it has adequate supplies of gas and until it is demonstrated that Transmission Corporation is not procuring gas supplies at the most reasonable level, then CGTC's actions should be viewed as proper (Tr. 1/21/82, p. 83).

It is apparent from the evidence in this case that the management of Columbia Gas of West Virginia, Inc., simply assumes that CGTC is acquiring supplies at the most reasonable price it can (Tr. 1/21/82, p. 124). The lack of interest demonstrated by Columbia of West Virginia, Inc., with regard to CGTC's purchases of gas and procurement policies can be demonstrated by a highly disturbing fact. The vice president of supply and gas utilization for Columbia, the person responsible for the development of retail customer requirements and the procurement of the supplies necessary to meet those requirements, has never read any of the contracts between CGTC and its suppliers in order to determine if the price paid by CGTC is reasonable or to determine if the contract terms, which ultimately are reflected in the rate paid by Columbia, are reasonable (Tr. 1/25/82, pp. 68-69). Columbia doesn't know CGTC's supply mix well enough to quantify the impact of the Section 107 Southwestern purchases on the rate charged to Columbia and Columbia has not reviewed the percentage of CGTC's requested increase, currently before FERC, and the cost of transportation compared to other pipeline suppliers (Tr.

Vol. 1/25/82, pp. 56-57, and 64-65).

Especially disturbing to this Commission is Columbia's apparent lack of concern over its market situation here in West Virginia. The gas market in this State is virtually saturated. Although Columbia has been adding new customers for a period of approximately three years now since curtailment was lifted by this Commission, residential natural gas usage has remained relatively stable and has, in fact, declined somewhat (Tr. 1/27/82, p. 119; Tr. Vol. 1/21/82, p. 127), and most of Columbia's major industrial customers have the capability of switching to alternate fuels if the price of natural gas reaches a certain level, those alternate fuels generally being No. 6 and No. 2 fuel oil (Industrial Intervenors' Ex. 2, p. 3; Tr. 1/22/82, pp. 18 and 128; Tr. 1/26/82, pp. 70-71; Industrial Intervenors' Ex. 3, pp. 2-3). However, there is nothing in the record of this case which would tend to demonstrate that Columbia has taken any steps to mitigate the impact of increased gas costs to this extremely important segment of its West Virginia market.

Columbia has testified that the only area of potential growth in its market is in the industrial sector (Tr. 1/26/82, p. 185). However, this market is extremely price sensitive due to its capacity to switch to alternate fuels. The West Virginia industrial load is 27.7 Bcf and comprises 40% of Columbia's total annual sales (Staff Ex. 1, Fifth Set of Interrogatories, Response No. 1). Columbia's industrial customers have the alternate fuel capacity to replace up to 16.3 Bcf of industrial load annually, which amounts to 24% of Columbia's total sales (Staff Ex. 1, Fifth Set of Interrogatories, Response No. 3(c)). Columbia could lose 10% of its projected sales for the contract year 1982 by the switching of one industrial customer (Weirton Steel Division of National Steel Corporation) to No. 6 fuel oil (Tr. 1/20/82, pp. 40-42). Additionally, another industrial customer has indicated that it may switch its current No. 2 fuel oil

capacity to No. 6 fuel oil capacity, which would represent a further loss of approximately 1.1 Bcf (Tr. 1/22/82, p. 144). In spite of the importance of Columbia's industrial load to its annual sales and the extreme price sensitivity of this market to increases in natural gas costs, Columbia has made absolutely no effort that can be seen from the record to keep the price of natural gas as low as possible.

There is not one single senior or middle level management employee whose sole responsibility is to look out for the interests of Columbia of West Virginia's customers in the Columbia Gas System. The majority of the corporate officers of Columbia Gas of West Virginia, Inc., are officers of all seven of the Columbia distributing companies, which results in an obvious and inherent conflict of interest between system goals and the goals and concerns of the individual corporations. Columbia has made no effort to attempt price adjustments which would encourage growth for the industrial market, which is perhaps the single most important sector of Columbia's market in West Virginia. Additionally, although Columbia does maintain a system of individual representatives who meet on a regular basis with the large industrial customers, instead of attempting to help the industrials solve some of their problems, these representatives simply tell the customer what the price is going to be and make no effort to assist the customer in maximizing gas purchases and, apparently, these representatives do not aggressively seek to represent these industrial customers in the Columbia Gas System (Tr. 1/26/82, pp. 65-66). And it must be kept in mind that these declining markets, in both the residential and industrial sectors, in Columbia's West Virginia jurisdictional service area, are occurring on top of a previously demonstrated excess supply of natural gas for the Columbia Gas System. Given the over-supply of gas on the market and the increasing decline in industrial and residential load, it is shocking to this Commission that Columbia has never yet conducted any price elasticity studies in order to determine

the optimal level of natural gas rates in order to maximize customer load and has made no effort to determine at what point natural gas cost increases will create more problems for Columbia Gas of West Virginia, Inc., than would be created by no rate increase. In our view, a prudent, independent company would have been taking these steps to insure that its market in West Virginia remained sound.

Finally, the Commission is of the opinion that Columbia's efforts to procure adequate gas supplies are woefully inadequate. It is obvious from a reading of the record that Columbia relies totally upon CGTC, without making any apparent effort to develop adequate gas supplies from other potential sources. An example is Columbia's lack of efforts to procure additional supplies of Appalachian gas, particularly West Virginia gas. Although the average CGTC commodity rate is around $3.40 per Mcf, Columbia will not pay a West Virginia producer any more than the Section 103 price, which is approximately $2.57 and then Columbia will only purchase from local producers on that basis when there are no other competitors for the gas, if Columbia can obtain the reserves over the life of the well and the producer can inject his supplies directly into Columbia Gas of West Virginia's system (Tr. 1/25/82, pp. 30-32 and Tr. 2/8/82, pp. 133-135). If the producer will not dedicate the entire reserves of the well to Columbia for the life of the well, or if the gas must be transported by a third party, Columbia will pay only $2.35 per Mcf, increasing the price by 10 cents every six months as long as the price doesn't exceed the CGTC commodity rate (Tr. 1/25/82, p. 32; Tr. 2/8/82, pp. 133-135). These terms are patently unreasonable on their face and evidence a true lack of interest on the part of Columbia in developing sources of gas other than CGTC.

As stated previously, this Commission is of the opinion that Columbia has not aggressively looked for other supplies of gas, as would a prudent, independent distribution

company; Columbia has not inquired or objected to CGTC's mix of gas, procurement policies or price; Columbia has not performed any price elasticity studies or marketability studies to determine what will happen to its market if gas costs reach a certain level; Columbia has not considered making any sort of adjustment to its price in order to maintain or maximize industrial load in this State; Columbia has not placed the interest of its West Virginia jurisdicational service territory above the interests of the Columbia Gas System; and finally, the management organization of the Columbia Distribution Companies in the Columbia Gas System creates an inherent conflict of interest between the interests of the system and the interests of the individual distribution companies. This can best be demonstrated by a disturbing failure of Columbia witness Lee to respond to a simple question. Mr. Lee was asked if, as Vice President of Supply and Gas Utilization for the Distribution Companies, he could follow a policy which conflicted with the overall policies or goals of Columbia Gas System. It is a simple question and a yes or no answer should have been possible. However, Mr. Lee never responded to that question (Tr. 1/26/82, pp. 172-176).

This Commission's statutory area of concern is not the well-being of the overall Columbia Gas System or the consolidated operation of the Columbia Distribution Companies. Our concern is the interests of the State and Columbia's jurisdictional customers. We are of the opinion that Columbia Gas of West Virginia, Inc., must alter its procurement and management practices in order to efficiently and adequately serve its customers and fulfill its public service obligations in this State. Therefore, we are of the opinion that it is necessary to establish certain new standards of care for which Columbia should be responsible in the future.

First, we are of the opinion that Columbia should let out bids for the purchase of some significant quantity of

natural gas supplies needed to fulfill its customer requirements. Both Appalachian Power Company and Monngahela Power Company follow this procedure in purchasing coal on the spot market for use in their generating units (See, for example, Resp. Ex. 1, pp. 3-6, Case Nos. 80-466-E-GI and 80-465-E-GI, *Monongahela Power Company* and *The Potomac Edison Company;* and Case No. 80-039-E-GI, *Appalachian Power Company,* Tr. pp. 46-47 and GB Exs. 5-8)

Second, we are of the opinion that Columbia should make a substantial effort to purchase West Virginia produced natural gas, making much the same commitment as has been made by Hope Natural Gas Company, a Division of Consolidated Gas Supply Corporation, as detailed in Hope's most recent Rule 30-C proceeding, Case No. 81-361-G-30C. In that case, in response to a petition filed by the Independent Oil and Gas Association of West Virginia, Hope presented extensive testimony on its efforts to increase its West Virginia purchases. Hope detailed the extensions to its facilities which it had begun or planned and Hope presented extensive testimony on the comparable costs for West Virginia gas and gas from different pipeline suppliers. Also, Hope presented testimony on its efforts to reduce its takes from pipeline suppliers and efforts to reduce its own drilling program.

Third, we are of the opinion that in future 30-C proceedings, Columbia must bear the burden of demonstrating that dependable lower-priced supplies of natural gas are not readily available from other sources, and that any contracts beween (sic) Columbia and a corporate affiliate or combination of corporate affiliates are not detrimental to the customers of Columbia. Under this standard, if Columbia does not satisfactorily meet its burden, the Commission might not authorize an increase greater than that which reflects the reasonable cost of natural gas which is determined to be readily available

within the State of West Virginia. The Commission is of the opinion that these are reasonable requirements. We would note that in this case Columbia failed to meet such a burden of proof.

Fourth, Columbia must be prepared in its next Rule 30-C proceeding to demonstrate efforts which it has taken to more adequately represent the interests of its West Virginia jurisdictional customers in the Columbia Gas System, as opposed to subordinating the interests of its West Virginia service area to those of the Columbia Gas System as a whole.

We recognize that the standards set forth above represent a new standard of care for a natural gas utility company seeking an increase pursuant to this Commission's Rule 30-C; therefore, we are making these standards effective on a prospective basis only and, thus, we will not now make any adjustment to Columbia's purchased gas costs to reflect what we consider to be the inefficient management practices and procurement practices demonstrated by the record in this case. We are of the opinion that fairness and equity require that these new standards not be applied until Columbia's next application under Rule 30-C, for several reasons. First, as stated, this is a new standard of care, of which Columbia had no notice prior to the issuance of this order. Second, we have no evidence in this case of sufficient alternate supplies to meet Columbia's requirements or an accurate cost standard to use for the repricing of the volumes purchased by Columbia from Transmission Corporation. Thus, we are unable to ascertain from the record whether or not Columbia's purchases from Transmission Corporation are reasonable or not due to the lack of evidence on alternative supplies. Third, this new standard of care for a natural gas utility in demonstrating efficient and adequate management and procurement practices is in the nature of a Commission investigation pursuant to West Virginia Code §24-2-7 (a).

Those proceedings are, by their nature, prospective only and thus so should be the standard established in this case. If Columbia fails to meet this new standard of care in its next Rule 30-C proceeding, this Commission is of the opinion that we would then have a basis for finding Columbia guilty of inadequate and inefficient management and procurement practices and subject to all of the sanctions contained within W. Va. Code §24-2-7(a) and (b).

IV. The Proper Treatment of Costs Associated with LNG

In its filing in this case, Columbia seeks to recover costs incurred in relation to the pass-through of Columbia Gas Transmission Corporation's purchases of regasified LNG from CLNG[18] from April 23,1980 through December 11, 1980. The LNG deliveries Algeria (sic) ended on April 11, 1980. If operations had continued at the Cove Point Plant at the March, 1980 level, the supply of LNG would have been depleted by April 23, 1980 (Staff Ex. No. 4, p. 18). Once the supplies of LNG were depleted, no further deliveries could have been delivered to CGTC from the Cove Point plant and the minimum bill provision of CLNG's FERC-approved tariff would have become operative. This minimum bill provision is substantially different from the other provisions of the tariff and would have resulted in a substantial reduction in the amounts to

[18] Columbia LNG Corporation has been a purchaser of liquified (sic) natural gas (LNG) from the Algerian national gas development corporation, known as Sonatrach. Under its agreement with Sonatrach, CLNG purchases the gas in Algeria and transports it in liquified (sic)form to its plant at Cove Point, Maryland, where it is then regasified and introduced into the Columbia Gas System. Columbia Gas Transmission Corporation is one of the purchasers of these volumes of liquified (sic) natural gas. LNG deliveries from Algeria to the Cove Point Plant ended on April 11, 1980. They have not yet been resumed. The tariff under which CGTC purchases the LNG from CLNG is subject to the approval of the Federal Energy Regulatory Commission under the provisions of the Natural Gas Act.

be billed by CLNG *(Id.)*. However, once deliveries from Algeria were halted, CLNG ceased normal operation and reduced its deliveries to an almost insignificant level (Staff Ex. 4, p. 19). As a result, CLNG was able to stretch out for eight months a supply of LNG that would normally have lasted approximately twelve days *(Id.)*. As a result, the minimum bill provision of CLNG's tariff did not take effect until December 11, 1980. The reduction in costs to Columbia, if the minimum bill provision had been invoked on April 23, 1980, would have been $917,000 *(Id.)*. Commission Staff has taken the position that Columbia's costs should be reduced by that $917,000 since Staff argues that the minimum bill provision should have been applied on April 23, 1980.

Columbia argues that the issue of the appropriateness of the applicability of the minimum bill provision is an issue which has been federally preempted and thus this Commission is without jurisdiction to consider the issue. Columbia points out that jurisdiction over the costs associated with LNG and approval of the tariffs is vested in the Federal Energy Regulator Commission and further points out that this precise issue is currently before FERC at Docket No. TA-80-2-21-002 (PGA 80-3). This Docket was initiated on July 18, 1980 upon complaint by the People's Counsel of Maryland. On March 5, 1982, presiding Administrative Law Judge Steven L. Grossman issued an initial decision in the case concluding that each LNG company had complied with its tariff provision relating to the imposition of the required minimum bill.

The Commission is of the opinion that the authorities cited previously in this Order with regard to Federal preemption of natural gas moving in interstate commerce are controlling here. As a result of those authorities, the conclusion is inescapable that this Commission has no authority to address the LNG issue raised by Staff in this

case. The authority over the LNG tariffs is clearly vested in the Federal Energy Regulatory Commission, pursuant to the provisions of the Natural Gas Act. Therefore, the Commission will deny the Staff adjustment to reduce Columbia's costs by the $917,000.

FINDINGS OF FACT

1. Columbia Gas of West Virginia, Inc., entered into the synthetic gas purchase and sales agreement with Columbia LNG Corporation on July 26, 1973, almost three years before submitting said contract to the Commission for consent and approval pursuant to W. Va. Code §24-2-12 (J.R. Lee Ex. 1; Case No. 8000 63 ARPSCWV 559 at 593 (1976)).

2. The Public Service Commission of West Virginia has adjusted the cost of SNG to be included in Columbia's cost of service in several rate cases prior to the initiation of Case No. 80-336-G-30C. See, Case No. 9147, 66 ARPSCWV 488, 494 (1978) and Case No. 79-088-G-42T, Final Order, July 17, 1980.

3. By order entered August 27, 1980, issues to be addressed in Case No. 80-336-G-30C were delineated, including: (1) the need for synthetic natural gas (SNG) based upon the most recent gas supply/demand data; (2) considering recent communications from Columbia to the Commission, the extent to which SNG and LNG could be replaced by other supplies of gas; and (3) the reasonableness of Columbia's proposed purchased gas costs in general.

4. In the June 1981 estimate of Columbia Gas Transmission Corporation for contract year 1981, CGTC is projecting an excess gas supply of 165,116,500 Mcf, approximately three times the surplus estimated during the original hearings in this case (Staff Ex. 1, First Set of

Interrogatories, Data Response Ex. 1(a) (Staff Ex. 3A, Case No. 80-366-G-30C)).

5. The June 1981 estimate of CGTC esimated (sic) SNG volumes for contract year 1981 in the amount of 80,501,968 Mcf *(Id.)*.

6. If there were no available supplies of SNG by which CGTC could reduce the amount of gas it needed to supply its customers, CGTC would have an excess supply for the 1981 contract year of almost 85 million Mcf *(Id.;* Staff Ex. 1A, pp. 2-3).

7. CGTC has the capacity to meet gas requirements resulting from the absence of SNG through additional withdrawals from storage (Staff Ex. 1A, pp. 4-5; Staff Ex. DJE-1A).

8. During contract year 1981, CGTC drew volumes substantially below the maximum annual storage turnover capability which it possesses (Staff Ex. 1A, pp. 5-6).

9. For the period July 1980 through October 1980, CGTC turned back almost 84 million Mcf from pipelines, local producers and company production, which could have offset the volumes of SNG that were taken during the subsequent heating season (Staff Ex. 1A, p. 6). For the period February 1981 through August 1981, CGTC turned back 107,733,000 Mcf of pipeline and local gas supplies *(Id.)*.

10. If Columbia Gas of West Virginia, Inc., were purchasing additional volumes from CGTC to offset the SNG volumes, there would not be an additional transportation charge over and above the average CGTC rate (Staff Ex. 1A, p. 7-8).

11. The March 1981 Blue Book estimate of CGWV for the contract year 1982 indicated that Columbia had total requirements of 74,114,300 Mcf, of which 70,144,100 Mcf represented retail sales (Staff Ex. 1, Second Set of

12. CGTC planned to deliver gas volumes sufficient to meet the 74,114,300 Mcf of CGWV's requirements, less the SNG volumes available to Columbia of 4,954,100 Mcf for contract year 1982 (Tr. 1/22/82, p. 198).

13. In Columbia's original filing in Case No. 81-366-G-30C, CGWV estimated total gas requirements of 72,314,200 Mcf, or 1.8 million Mcf less than the estimates which CGTC used for its planning purposes (Columbia Ex. 2, Schedule 2, as amended); Columbia further reduced its requirements by another 3 million Mcf as the result of an industrial customer switching from natural gas to fuel oil, with a resulting total gas requirement of 69,314,200 Mcf or 4.8 million Mcf less than its initial requirements estimate, with an estimated sales figure of 66,923,900 Mcf (Columbia Ex. 2, Schedule 2, Sheet 2 of 2, Revised 1/25/82).

14. Based on the March 1981 estimates, CGTC planned to deliver gas volumes sufficient to meet 69,160,200 Mcf of Columbia's 1982 contract year requirements, or only 154,000 Mcf less than Columbia's total gas requirements including the SNG volumes in this case (Tr. 1/22/82, p. 198).

15. CGTC has large excess supplies of natural gas available to it for contract years 1981, 1982, 1983, and 1984 (Staff Ex. 1, First Set of Interrogatories, Response to 1(b) and Staff Ex. 6, Response 1(4)-2).

16. The excess supplies available to CGTC during these contract years range from 138,876,000 Mcf to 188,806,000 Mcf, all substantially in excess of the 154,000

Mcf shortfall between the amount of gas CGTC had planned to supply to Columbia and Columbia's actual requirements *(Id.)*.

17. Under three service agreements between Columbia and CGTC, Columbia has the right to demand 127,327,215 Mcf on an annual basis, or almost twice Columbia's projected total gas requirements for contract year 1982 (Staff Ex. 1, First Set of Interrogatories, Responses 10(b) (1), (2) and (3)).

18. CGTC has substantial annual storage turnover capability which has not been fully utilized during the years which this case has been before the Commission (Staff Ex. 1A, pp. 5-6).

19. CGTC has consistently been turning back substantial supplies of natural gas which would be available to it from pipelines, local producers and company production, which supplies could be used to restore the amounts of natural gas held in storage by CGTC to maximum amounts (Staff Ex. 1, First Set of Interrogatories, Response 6(a), Revised Schedule).

20. CGWV's general service customers pay more than their actual share of CGWV's gas costs, which could be remedied through a revision of the treatment of over and under-recoveries reconciliations, which revision, suggested by Staff, is not objected to by Columbia (Staff Ex. 4, p. 3-16; Staff Ex. DJE-1 through DJE-7 and Tr. 1/21/82, pp. 15 and 31-33).

21. Columbia Gas of West Virginia, Inc., is an intrastate natural gas distribution company, and is a public utility subject to this Commission's jurisdiction and subject to the laws of the State of West Virginia.

22. Columbia Gas of West Virginia, Inc., does not

make any substantive review of filings made before FERC by CGTC with regard to purchase, supply mix, or gas costs (Tr. 1/21/82, p. 81) and there is no competitive analysis made of price lists proposed to Columbia by CGTC *(Id.)*.

23. Columbia makes no study of the effects of CGTC's filings at FERC with regard to the mix of gas or to the reasonableness of the price of certain volumes of gas included in CGTC's filing (Tr. 1/21/82, pp. 82-83).

24. Columbia assumes that CGTC is acquiring supplies at the most reasonable price (Tr. 1/21/82, pp. 123-124).

25. Columbia's vice president of supply and gas utilization has not read any of the contracts between CGTC and its suppliers in order to determine if the price paid by CGTC is reasonable or to determine if the contract terms, which ultimately are reflected in rates paid by Columbia, are reasonable (Tr. 1/25/82, pp. 68-69).

26. Columbia has not reviewed the percentage of CGTC's current requested increase before FERC and its cost of transportation compared to other pipeline suppliers and Columbia does not know CGTC's supply mix well enough to quantify the impact of the Section 107 Southwestern purchases on the rate charged to Columbia (Tr. 1/25/82, pp. 56-57 and 64-65).

27. The gas market in West Virginia is virtually saturated and although Columbia has been adding new customers for a period of approximately three years, residential natural gas usage has declined (Tr. 1/27/82, p. 119; Tr. Vol. 1/21/82, p. 127).

28. Many of Columbia's major industrial customers have the capability of switching to alternate fuels if the price of natural gas reaches a certain level (Industrial

Intervenors' Ex. 2, p. 3; Tr. 1/22/82, pp. 18 and 128; Tr. 1/26/82, pp. 70-71; Industrial Intervenors' Ex. 3, pp. 2-3).

29. Columbia's only area of potential growth in its market is in the industrial sector (Tr. 1/26/82, p. 185).

30. The West Virginia industrial load comprises 40% of Columbia's total annual sales and Columbia's industrial customers have alternative fuel capacity to replace approximately 24% of Columbia's total sales with alternate fuels (Staff Ex. 1, Fifth Set of Interrogatories, Response No. 1 and Response No. 3(c)).

31. Columbia could lose 10% of its projected sales for contract year 1982 by the switching of one industrial customer to No. 6 fuel oil (Tr. 1/20/82, pp. 40-42).

32. There is no evidence in the record which indicates that Columbia has made any effort either to keep the price of natural gas as low as possible or to mitigate the impact of increased gas costs on its industrial market, even though the industrial market comprises such a large percentage of Columbia's total annual sales.

33. There is not one single senior or middle level management employee whose sole responsibility is to look out for the interests of Columbia of West Virginia, Inc.'s customers in the Columbia Gas System.

34. The majority of the corporate officers of Columbia Gas of West Virginia, Inc., are officers of all seven of the Columbia Distributing Companies.

35. Columbia's industrial customer representatives make no effort to assist the industrial customers in maximizing gas purchases and do not aggressively seek to represent the industrial customers in the Columbia Gas

System (Tr. 1/26/82, pp. 65-66).

36. Columbia has never conducted any price elasticity studies in order to determine the optimal level of natural gas rates in order to maximize customer load and has made no effort to determine at what point natural gas cost increases will create more problems for Columbia than would be created by no rate increase.

37. Columbia will not pay a West Virginia producer any more than the NGPA Section 103 price, which is approximately $2.57, almost a dollar less than average CGTC rate, and will only purchase from local producers on that basis when there are no other competitors for the gas, if Columbia can obtain the reserves over the life of the well and the producer can inject his supplies directly into Columbia's system (Tr. 1/25/82, pp. 30-32 and Tr. 2/8/82, pp. 133-135).

38. In all other circumstances, Columbia will pay only $2.35 per Mcf to local producers, increasing the price by 10 cents every six months, as long as the price doesn't exceed the CGTC commodity rate (Tr. 1/25/82, p. 32; Tr. 2/8/82, pp. 133-135).

39. The LNG gas cost issue in this case amounts to $917,000 (Staff Ex. 4, p. 19).

40. The issue of the LNG minimum bill is currently before FERC at Docket No. TA-80-2-21-002 (PGA 80-3).

CONCLUSIONS OF LAW

1. Under the terms of W.Va. Code §24-2-12, unless the consent and approval of the Public Service Commission is first obtained, no public utility subject to the provisions of Chapter 24 may by any means, direct or indirect, enter

into any contract or arrangement for management construction, engineering, supply or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.

2. Under the terms of W.Va. Code §24-2-12, every contract, arrangement or other transaction referred to in that section, made otherwise than as provided for in the section, shall be void to the extent that the interests of the public in this state are adversely affected.

3. Columbia entered into the SNG contract with CLNG in violation of W.Va. Code §24-2-12, in that Columbia entered into a contract with an affiliated corporation without first obtaining the approval of the Public Service Commission.

4. To the extent that the interests of the public in this State are not adversely affected by the SNG contract, that contract may be considered valid by this Commission for ratemaking purposes; to the extent that the interests of the public in this State are adversely affected by the SNG contract, it is void for ratemaking purposes.

5. Pursuant to W.Va Code §24-2-12, this Commission has the authority to permit a corporation to enter into a contract, but withhold approval of the terms and conditions of that contract, and to determine that this Commission shall not be bound in a ratemaking proceeding by the terms of that contract.

6. Any contract entered into by a public utility company subject to the jurisdiction of this Commission must be deemed to have been entered into in contemplation of the exercise by the State of its regulatory power whenever the public interest requires the exercise of that power. See, *Preston County Light and Power Company v. Renick, et al,* 145 W.Va. 115, 113 S.E. 2d 378 (1960).

7. This Commission has the authority to disregard the SNG contract for ratemaking purposes and to disallow part or all of the SNG costs if we determine that those costs are unreasonable, all pursuant to Chapter 24 of the West Virginia Code and West Virginia State Law.

8. By repricing the volumes of SNG taken by Columbia under the SNG contract, this Commission has not placed an impermissible burden on interstate commmerce, (sic) since this Commission is regulating costs incurred by a local distributing company engaged in intrastate commerce, i.e. delivering gas for local consumption to ultimate consumers of the product, rather than attempting to regulate the rate for gas delivered in interstate commerce by an interstate pipeline company to Columbia.

9. The United States Supreme Court has long upheld the authority of states to regulate direct sales by a company for consumptive uses in intrastate commerce whether by an intrastate public utility or an interstate pipeline company. *Panhandle Eastern Pipeline Company v. Public Service Commission*, 332 U.S. 507 (1947); *Public Utilities Commission of Ohio v. United Fuel Gas Company*, 317 U.S. 456 (1943); *Panhandle Eastern Pipeline Company v. Michigan Public Service Commission*, 341 U.S. 329 (1951); *Federal Power Commission v. Transcontinental Gas Pipeline Corporation*, 365 U.S. 1 (1961), and *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964).

10. In the instant case, the Commission has not attempted to intrude upon the authority of the Federal Energy Regulatory Commission by attempting to regulate rates charged by a Company subject to the jurisdiction of the Federal Energy Regulatory Commission for the delivery of natural gas in interstate commerce.

11. The Commission's action in repricing the SNG volumes taken by Columbia pursuant to the SNG contract does not violate the plain language of the commerce clause of the United States Constitution since our decision does not impose a direct burden upon interstate commerce, but merely regulates the sale and delivery of natural gas in intrastate commerce by a public utiltiy company subject to state regulation. *Missouri v. Kansas Natural Gas Company,* 265 U.S. 298 (1924); *Federal Power Commission v. Southern California Edison Company,* 376 U.S. 205 (1964); *Great Atlantic and Pacific Tea Company, Inc. v. Cottrell,* 424 U.S. 365 (1976).

12. Commission action to reprice the SNG volumes does not violate the supremacy clause of the United States Constitution, since there is no federal legislation which has preempted state jurisdiction over Columbia's entry into the SNG contract and since the Federal Energy Regulatory Commission has explicitly held, and been upheld by the United States Court of Appeals for the District of Columbia Circuit, that it had no authority over the production, transportation or sale of unmixed synthetic gas. See, Sections 1B and 2(5) of the Natural Gas Act; *Re Algonquin SNG, Inc.,* F.P.C. Op. No. 637, 97 PUR 3d 299 (1972); *Re Columbia LNG Corporation,* F.P.C. Op. No. 669, 1 PUR 4th 524 (1973); *Henry v. Federal Power Commission,* 513 F. 2d 395 (1975).

13. In these cases the Commission has not attempted to look behind the contract rate for SNG.

14. Even if our action to reprice the SNG volumes would impair the ability of Columbia to fulfill its obligations under the SNG contract, our action would come within recognized regulatory authority as set forth by the United States Supreme Court, regarding the exercise of the police power by state regulatory authorities. See,

Northern Pacific Railway Company v. Duluth, 208 U.S. 583 (1908); *Atlantic Coastline v. Goldsboro,* 232 U.S. 548 (1914); *Veix v. Sixth Ward Assocation,* 310 U.S. 32 (1940); and *Allied Structural Steel Company v, Spannaus,* 438 U.S. 234 (1978).

15. The prohibition of statutes or state action impairing the obligation of contracts does not prevent the State from exercising such powers as may be vested in it for the promotion of the common welfare or are necessary for the general good of the public, even though contracts previously entered into between individuals may thereby be affected. *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234 (1978) at 241-242.

16. Commission action in these consolidated cases to reprice the SNG volumes: (1) has been taken to deal with a broad, generalized economic problem; (2) operates in an area which has already been subject to state regulation at the time the contractual obligation was originally undertaken; (3) affects a temporary alteration of the contractual relationship between Columbia and CLNG if, indeed, our action alters the contractual relationship at all; and (4) affects every member of the specific group to which Columbia belongs, that is, corporations subject to our jurisdiction who have entered into an affiliated contract for the delivery of SNG. See, *Spannaus,* 438 U.S. at 250.

17. Chapter 24 of the West Virginia Code empowers this Commission to enforce and regulate the practices, services and rates of public utilities in order to insure fair and prompt regulation of those utilities in the interest of the using and consuming public and to encourage the effective and efficient management of regulated utility enterprises; additionally, the Public Service Commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the

general interests of the State's economy and the interest of the utilities subject to its jurisdiction. W.Va. Code §§24-1-1(a) and (b).

18. W.Va. Code §§24-2-2, 24-2-3 and 24-2-4a grant this Commission the authority to investigate any proposed rate of a public utility subject to our jurisdiction and to make whatever changes we deem appropriate based upon the evidence in the record before us.

19. The purpose of establishing a regulatory commission such as the Public Service Commission of West Virginia is to prevent utility service consumers in this State from being burdened with unreasonable costs incurred by a public utility, even if those costs are incurred pursuant to a contract entered into by the public utility.

20. Under West Virginia State Law, private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict. See, *Mill Creek Coal and Coke Company v. Public Service Commission*, 84 W.Va. 662, at Syllabus Pt. 9 and pp. 676-677, 100 S.E. 557 (1919); *Preston County Light and Power Company v. Renick*, 145 W.Va. 115 at 129, 113 S.E. 2d 378 (1960).

21. Columbia Gas of West Virginia, Inc., has been granted full procedural due process in these cases, in that: (1) the order issued by the Commissionon August 27, 1980, in Case No. 80-336-G-30C, specifically set forth the issue of the need for SNG; (2) Columbia has been granted a hearing on this issue both in October of 1980 and January and February of 1982; (3) Columbia has been permitted several opportunities to brief the issues involved in both Case Nos. 80-336-G-30C and 81-366-G-30C; and (4) since the Order of October 31, 1980 entered in Case No. 80-336-G-30C approved an interim purchased gas cost for Columbia, subject to

modification as a result of any subsequent decision regarding the cost of SNG and its inclusion in Columbia's cost of purchased gas, thus nullifying any argument Columbia may choose to make alleging that this Commission never informed Columbia that the reasonableness of the inclusion of SNG in Columbia's PGA was an issue in this proceeding.

22. Circumstances such as those facing the Commission in this case, in which a regulated utility has, by contract, committed itself to pay high prices for a commodity when lower priced alternatives are available to serve the utility's customers, must be considered as exceptions to the general standards set forth in the *Hope* and *Permian Basin* cases, set forth previously in this order.

23. The *Hope* and *Permian Basin* standards should not and must not be used as mechanisms which allow companies to avoid the consequences of their own unreasonable actions, as discussed at pages 29 and 31 of this order.

24. Reason dictates that a company must not be permitted to take an action which violates state or federal law and which also results ultimately in the incurrence of unreasonable and unnecessary expenses and then come before this Commission or a reviewing Court, hiding behind the veil of inadequate rate of return and avoid the responsibility for those actions.

25. Financial integrity for ratemaking purposes must be based upon those revenues and operating expenses which have been found to be just and reasonable pursuant to Commission review.

26. The adjustment which this Commission will make to Columbia's rates to reflect the repricing of the SNG volumes will be made through the over and under-recovery

volumes will be made through the over and under-recovery mechanism of Rule 30-C itself, on a *prospective* basis only, thus coming specifically within the process approved by the Supreme Court of Appeals of West Virginia in *Virginia Electric and Power Company v. Public Service Commission*, ____ W Va. ____, 248 S.E.2d 322 at Syllabus Pt. 3

27. Columbia Gas of West Virginia, Inc., is not similarly situated to those other gas companies subject to the jurisdiction of this Commission who purchase SNG from CLNG, and thus, the Commission's decision to investigate the reasonableness of Columbia's SNG purchases before investigating the reasonableness of the SNG purchases by these other companies does not violate the equal protection clauses of the Federal or State Constitutions. *Tweel v. Racing Commission*, 138 W.Va. 531 at 539, 76 S.E.2d 874, (1953); *Commonwealth v Frost*, 172 S.W.2d 905 at 909 (Ky., 1943).

28. Columbia Gas of West Virginia is several times larger than all of the other corporations in West Virginia which purchase SNG combined, which difference alone allows this Commission to treat Columbia Gas of West Virginia differently than we treat the other companies; additionally, Columbia is the only purchaser of SNG which is affiliated with the supplier of SNG and Columbia serves several major industries and employers in this State, with the volume of gas delivered and sold by Columbia and sold to its West Virginia jurisdictional customers being far in excess of the combined total of gas sold and delivered by the other companies which purchase SNG, thus rendering unreasonable any assertion that Columbia is similarly situated to these other companies.

29. Given the constraints upon the ability of the Commission's Staff to audit and investigate every public utility

subject to our jurisdiction, Commission resources must of necessity be apportioned according to the impact that the Staff investigation and Commission decision will have upon the greatest body of ratepayers in this State.

30. Incurred cost is not an appropriate pricing standard to use in order to determine the reasonableness of the cost of the SNG, since under that standard, there would be no point in Commission review of a company's operating expenses to determine whether or not they are just and reasonable.

31. The traditional standard to determine the reasonableness of incurred costs is whether or not these costs are reasonable and necessary operating expenses for the Company's public utility business in this State, following a Staff audit of any given cost.

32. The authority of this Commission to disallow expenses incurred by a company for ratemaking purposes has long been upheld by the Supreme Court of Appeals of West Virginia, thus rendering inaccurate any argument that incurred cost represents a reasonable standard in reviewing costs incurred by a public utility. See, *The Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission of West Virginia,* Slip Opinion No. 15424, March 4, 1982, Syllabus Pt. 7; *Lumberport-Shinnston Gas Company v. Public Service Commission of West Virginia,* ___ W.Va ___, 271 S.E.2d 438 (1980) at pp. 442-443.

33. The use of a comparable goods and services pricing standard by this Commission has been upheld by the Supreme Court of Appeals of West Virginia, and thus constitutes an appropriate pricing standard in determining whether or not the cost of a good or product is reasonable. See, *The Chesapeake and Potomac Telephone Company of*

West Virginia v. Public Service Commission, supra.

34. As detailed by the evidence set forth at pages 38 through 43 of this order and in Findings of Fact Nos. 3 through 19, Columbia Gas of West Virginia does not need the SNG volumes in order to meet its requirements including company use, wholesale sales and unaccounted for gas.

35. It is unreasonable to require West Virginia ratepayers to pay higher prices which reflect the cost of SNG, when that SNG is not needed by Columbia Gas Transmission Corporation to serve Columbia Gas of West Virginia, Inc., or by Columbia Gas of West Virginia, Inc. to meet the requirements of its customers. W.Va. Code §§24-1-1(a); 24-2-3; 24-2-4a.

36. Prudent, non-affiliated companies would have attempted to renegotiate the SNG contract with CLNG or would have attempted to sell the SNG to a third party, either through an off-system sale or through a private contract with an industrial company willing to pay a higher price for an assured supply of natural gas or would have requested CLNG to renegotiate the terms of its high-priced feedstock contract.

37. The treatment of over or under-recovery amounts recommended by Staff witness Ellis, i.e. to spread these over or under-recoveries on a rate schedule basis, is reasonable and should be adopted by the Commission, since the current method of calculating over and under-recoveries results in some rate schedules receiving less than their proportionate share of the effect of the over or under-recoveries of purchased gas costs, while other rate schedules receive more than their proportionate share of the same effects.

38. The authority to regulate the rate for Section 107 gas is vested solely within the Federal Government pursuant to Sections 107, 121 and 601 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3301 *et seq.* and the Natural Gas Act of 1938, 15 U.S.C. §717 *et seq.*

39. By requiring full cost recovery for amounts paid for purchases of natural gas under the NGPA, unless the Federal Energy Regulatory Commission determines that there has been a showing of fraud, abuse, or similar grounds, Congress has explicitly prohibited the States from regulating or finding unreasonable prices paid for natural gas pursuant to the NGPA, thus preempting any authority the State may have to investigate or regulate the price paid for gas purchased pursuant to the NGPA.

40. This Commission has the authority and obligation to investigate the reasonableness of Columbia's purchasing practices with regard to the volumes of natural gas which it buys and its management practices with regard to the operation of the Company, pursuant to W.Va. Code §§24-1-1 and 24-2-7.

41. Columbia Gas of West Virginia, Inc., has engaged in purchasing practices and management practices which are unreasonable in that they are designed to further the interests of and benefit the Columbia Gas System as a whole, rather than Columbia's West Virginia jurisdictional customers, and in that, as demonstrated at pages 52 through 56 of this order and Findings of Fact Nos. 20 through 38, Columbia Gas of West Virginia, Inc., has not aggressively looked for other supplies of gas as would a prudent, independent distribution company; Columbia has not inquired or objected to CGTC's mix of gas, procurement policies or price; Columbia has not performed any price elasticity studies or marketability studies to determine what will happen to its market if gas costs reach a certain level; Columbia has not considered making any sort of

an adjustment to its price in order to maintain or maximize industrial load in this State; Columbia has not placed the interests of its West Virginia jurisdictional service territory above the interests of Columbia Gas System; and the management organization of the Columbia Distribution Companies in the Columbia Gas System creates an inherent conflict of interest between the interests of the system and the interests of the individual distribution companies.

42. In order to insure that Columbia alters its procurement and management practices in order to efficiently and adequately serve its customers and fulfill its public service obligations in this State, it is necessary for this Commission to establish certain new standards of care for which Columbia should be responsible in the future, as detailed at pages 57 through 58 of this order.

43. Since the new standards of care established in this order are standards of which Columbia has not had notice prior to the issuance of this order, and since we have no evidence in this case of sufficient alternate supplies to meet Columbia's requirements or of an accurate cost standard to use for the repricing of the volumes purchased by Columbia from CGTC, the Commission is of the opinion that these new standards of care for Columbia should be applied on a prospective basis only and should not form the basis for any adjustment to Columbia's purchased gas costs in this case.

44. The issue of the reasonableness of CLNG's application of the minimum bill provision of its FERC-approved tariff regarding sales of LNG is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission and is currently before FERC at Docket No. TA-80-2-21-002 (PGA80-3).

ORDER

IT IS, THEREFORE, ORDERED that:

1. The purchased gas costs approved for use by Columbia Gas of West Virginia, Inc., for all gas supplied on and after November 1, 1980 in the Commission's Final Order in Case No. 80-336-G-30C, dated October 31, 1981, be and they hereby are, affirmed for the period November 1980 through October 1981;

2. The purchased gas costs calculated on Appendix A, attached hereto, be, and they hereby are, approved for use by Columbia Gas of West Virginia, Inc. for all bills rendered on and after November 1, 1981 through October 31, 1982, as set forth on Appendix A;

3. The petition filed by Columbia Gas of West Virginia, Inc. in this case on February 8, 1982, which petition requested the implementation of a three-tiered purchased gas adjustment, be, and it hereby is, granted insofar as it requested the three-tier implementation of purchased gas costs, but is denied insofar as it requested a specific purchased gas cost for any of those periods which differs from the rates approved herein and attached hereto in Appendix A;

4. Any under or over-recoveries generated as a result of the difference between the interim purchased gas costs approved in the Interim Order in Case No. 81-366-G-30C entered on October 31, 1981, and the purchased gas costs approved herein, be recovered through the actual cost recovery mechanisms of Rule 30-C, thus eliminating any need for either refunds or surcharges in this case;

5. In its next purchased gas cost proceeding before this Commission, Columbia shall present evidence to

demonstrate its compliance with the following: (a) the use of bids for the purchase of some significant quantity of natural gas supplies needed to fulfill its customer requirements; (b) Columbia's efforts to purchase West Virginia produced natural gas; (c) evidence in support of Columbia's burden to demonstrate that dependable lower-priced supplies of natural gas are not readily available from other sources and that Columbia's contracts with affiliated corporations are not detrimental to Columbia's customers; and (d) efforts which Columbia has taken to more adequately represent the interests of its West Virginia jurisdictional customers in the Columbia Gas System, as opposed to subordinating the interests of its West Virginia service area to those of the Columbia Gas System as a whole, all as set forth previously in this order;

6. The petition for a corrective order filed by Columbia on November 7, 1981, in Case No. 80-336-G-30C be, and it hereby is, denied, for the reasons set forth previously in this order;

7. The Executive Secretary shall serve a copy of this order upon all parties to this proceeding by United States First Class Mail.

A TRUE COPY

TESTE: /s/HOWARD N. CUNNINGHAM

Howard N. Cunningham
Executive Secretary

COLUMBIA GAS OF WEST VIRGINIA
CASE NUMBERS 80-336 AND 81-366
DETAIL OF PGA CALCULATIONS—TOTAL COMPANY BASIS
11/1/81—10/31/82

APPENDIX A
Sheet 1 of 3

	Annual Projections	Nov. '81 thru Feb. '82	Mar. thru Aug.	Sept. thru Oct.
	$(000)	$(000)	$(000)	$(000)
Columbia Projections:				
Purchases				
CGTCO	262,245	112,834	112,480	36,931
CLNG	25,525	8,509	12,762	4,254
Total	287,770	121,343	125,242	41,185
Estimated Sales—MMCF	69,923.9	31,528.4	30,380.1	8,015.4
PGC per Mcf	$4.115	$3.849	$4.123	$5.138
6/30/80 Over Recovery Balance $587,000 ÷ 69,923.9 MMCF	(.008)	(.008)	(.008)	(.008)
7/80 thru 6/81 Under Recovery $2,158,000 ÷ 69,923.9 MMCF	.031	.031	.031	.031
Total PGC and Under Recoveries per Mcf	$4.138	$3.872	$4.146	$5.161

COLUMBIA GAS OF WEST VIRGINIA

APPENDIX A
Sheet 2 of 3

CASE NUMBERS 80-336 AND 81-366
DETAIL OF PGA CALCULATIONS—TOTAL COMPANY BASIS
11/1/81—10/31/82

	Annual Projections	Nov. '81 thru Feb. '82	Mar. thru Aug.	Sept. thru Oct.
	$(000)	$(000)	$(000)	$(000)
Commission Decision:				
Purchases (From Sheet 1)	287,770	121,343	125,242	41,185
SNG Adjustment*	(11,225)	(3,742)	(5,612)	(1,871)
Adjusted Cost	276,545	117,601	119,630	39,314
Estimated Sales—MMCF	69,923.9	31,528.4	30,380.1	8,015.4
PGC per Mcf	$3.955	$3.730	$3.938	$4.905
6/30/80 Over Recovery Balance $587,000 ÷ 69,923.9 MMCF	(.008)	(.008)	(.008)	(.008)
7/80 thru 6/81 Over Recovery** $7,072,000 ÷ 69,923.9 MMCF	(.101)	(.101)	(.101)	(.101)
Total PGC and Over Recoveries	$3.846	$3.621	$3.829	$4.796

* To reprice total delivered SNG to average delivered Columbia Gas Transmission Company price, per Staff Exhibit DJE-11.

** Adjusted per Commission decision to price *actual* SNG deliveries to Columbia Gas Transmission's average rate of $2.658 per Mcf. This adjustment reflects repricing from November, 1980, the effective date of the Commission's decision in Case No. 80-336, through June, 1981, the end of the actual cost adjustment period in Case No. 81-366.

COLUMBIA GAS OF WEST VIRGINIA
CASE NUMBERS 80-336 AND 81-366
DETAIL OF PGA CALCULATIONS—BY RATE SCHEDULE
11/1/81—10/31/82

APPENDIX A
Sheet 3 of 3

		Rate Schedules				
	Total	LV1	LV2	IUS1	IUS2	GS
Calculation of Over Recovery by Rate Schedule:						
7/80—6/81 Over Recovery $(000)	7,072	(49)	282	164	67	6,608
Projected Sales—MMCF	69,923.9	11,197.8	20,402.4	1,178.7	401.2	36,743.8
Over Recovery Increment $ per Mcf	.101	(.004)	.014	.139	.167	.180
PGC, Including Actual Cost Adjustment:						
Nov., '81 thru Feb., '82:						
PGC per Mcf (from Sheet 2)		$3.730	$3.730	$3.730	$3.730	$3.730
Less Over Recoveries:						
6/80 Balance Residual		(.008)	(.008)	(.008)	(.008)	(.008)
7/80 thru 6/81 Over Recovery		.004	(.014)	(.139)	(.167)	(.180)
PGC Before B & O Tax		$3.726	$3.708	$3.583	$3.555	$3.542
PGC Incl. B & O Tax		$3.893	$3.874	$3.593	$3.565	$3.701

COLUMBIA GAS OF WEST VIRGINIA
CASE NUMBERS 80-336 AND 81-366
DETAIL OF PGA CALCULATIONS—BY RATE SCHEDULE
11/1/81—10/31/82
(continued)

APPENDIX A
Sheet 3 of 3
(Continued)

March thru August:					
PGC per Mcf (from Sheet 2)					
Less Over Recoveries:	$3.938	$3.938	$3.938	$3.938	$3.938
6/80 Balance Residual	(.008)	(.008)	(.008)	(.008)	(.008)
7/80 thru 6/81 Over Recovery	.004	(.014)	(.139)	(.167)	(.180)
PGC Before B & O Tax	$3.934	$3.916	$3.791	$3.763	$3.750
PGC Incl. B & O Tax	$4.110	$4.092	$3.801	$3.773	$3.918
September thru October:					
PGC per Mcf (from Sheet 2)					
Less Over Recoveries:	$4.905	$4.905	$4.905	$4.905	$4.905
6/80 Balance Residual	(.008)	(.008)	(.008)	(.008)	(.008)
7/80 thru 6/81 Over Recovery	.004	(.014)	(.139)	(.167)	(.180)
PGC Before B & O Tax	$4.901	$4.883	$4.758	$4.730	$4.717
PGC Incl. B & O Tax	$5.121	$5.102	$4.771	$4.743	$4.928

page nos for charts 128a 129a 130a 131a

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 25th day of August, 1982.

CASE NO. 80-336-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Application to change rates effective
November 1, 1980
General Order 183.4, Purchased Gas
Application.

CASE NO. 81-366-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Application to change rates, effective
November 1, 1981, according to Rule 30-C,
General Order 183.4, Purchased Gas
Application.

COMMISSION ORDER ON PETITIONS FOR RECONSIDERATION

On June 28, 1982, the Commission entered an Order on Reconsideration in Case No. 80-336-G-30C, Columbia Gas of West Virginia, Inc., and a Final Order in Case No. 81-366-G-30C, Columbia Gas of West Virginia, Inc. in which the Commission, among other things, refused to pass through the entire contract rate for synthetic natural gas to the customers of Columbia Gas of West Virginia, Inc. (Columbia), and established certain standards by which Columbia's future gas procurement efforts will be judged.

On July 8, 1982, Columbia filed a Petition for Rehearing and Reargument in the above-styled and numbered cases, alleging numerous errors in the Commission's order of June 28, 1982. Also, on July 8, 1982, West Virginia Industrial Intervenors (Industrial Intervenors), an intervening party in the above-styled cases, filed a petition for Reconsideration and Modification of the Commission's Final Order of June 28, 1982, requesting that overcharges applicable for the period November 1, 1981 through February 28, 1982, be applied to the Tier Three rates established in the order of June 28, 1982 for the period September 1, 1982 through October 31, 1982.

On July 13, 1982, Columbia filed a reply to the Petition for Reconsideration and Modification filed by Industrial Intervenors in opposition to the request rate adjustment. Also on July 13, 1982, Commission Staff filed a Response to Columbia's petition for Rehearing and Reargument and the Industrial Intervenors' Petition for Reconsideration and Modification, urging the Commission to issue an order denying the relief requested in the two petitions.

DISCUSSION

Having reviewed the petitions for reconsideration filed in this case and replies thereto, as well as this Commission's order of June 28, 1982, and the entire record in these consolidated proceedings, the Commission is of the opinion that both petitions for reconsideration and reargument should be denied and that our order of June 28, 1982 should be affirmed, as modified below.

Case No. 80-336-G-30C

To the extent that, through its petition of July 8, 1982, Columbia seeks a further reconsideration of the Commission's decision in Case No. 80-336-G-30C, said petition

should be denied for the reason that there is no further administrative relief which can or should be granted to Columbia in that case. On October 31, 1981, this Commission entered its Final Order in Case No. 80-336-G-30C. In December of 1981 this Commission granted a petition for reconsideration filed by Columbia in Case No. 80-336-G-30C and further hearings were held in that case in January of 1982. The order entered by the Commission on June 28, 1982, as to Case No. 80-336-G-30C was this Commission's Order on Reconsideration. Thus, *Columbia has exhausted its administrative remedies in that case and no further administrative relief can be or should be considered.*

Case No. 81-366-G-30C

The Commission has reviewed Columbia's petition for reconsideration in case No. 81-366-G-30C very thoroughly and is of the opinion that Columbia has raised no new issues or arguments which have not been previously considered by the Commission in that case. With regard to Columbia's arguments that it has been denied due process of law as to the immediate application of the standards adopted by the Commission in order to judge Columbia's gas procurement efforts, the Commission is of the opinion that it is more appropriate to address those arguments in Columbia's newest Rule 30-C proceeding.

With regard to the petition for reconsideration filed by West Virginia Industrial Intervenors in this case, the Commission is of the opinion that said petition should be denied. Industrial Intervenors have asked that the overcharges collected by Columbia for the period November 1, 1981 through February 28, 1982 be credited to the Tier Three rates approved by the Commission in our order of June 28, 1982, to be effective for the period September 1, 1982, to be effective for the period September 1, 1982 through October 31, 1982, rather than postpone the

crediting of said overcollections until the time period running from November 1, 1982 through October 31, 1983. Industrial Intervenors suggest that the applicable refund should be credited to the Tier Three rates for several reasons, including: (1) any refunds for the winter months are now actual and known overcharges; (2) the purchased gas adjustment for Tier Three is so large that it will have an immediate and detrimental impact on the West Virginia industrial community; (3) the purchased gas adjustment for Tier Three is based on estimates only; (4) the amounts overpaid to Columbia have been accumulating and have been used by Columbia for up to eight months, while the consumers have been deprived of the use of these funds; and (5) any reduction of the purchased gas amount for the Tier Three period can have a beneficial effect on the West Virginia economy.

While the Commission is certainly in sympathy with the plight of the Industrial Intervenors in this case with regard to the impact of the Tier Three purchased gas adjustment, *the Commission must point out that as detrimental an impact as the Tier Three purchased gas adjustment will have on Industrial Intervenors, the upcoming purchased gas rate to become effective on November 1, 1982, may, if granted as requested, have an even greater and more detrimental impact on West Virginia's industrial community.* Therefore, the Commission is of the opinion that the application of the overcharges collected by Columbia for the period November 1, 1981 through February 28, 1982, will be of more use to the industrial community when applied to Columbia's upcoming purchased gas adjustment, which is scheduled to take effect on November 1, 1982.

FINDING OF FACT

The order issued by the Commission on June 28, 1982,

was this Commission's Order on Reconsideration in Case No. 80-336-G-30C.

CONCLUSIONS OF LAW

1. The possible administrative remedies for a company before this Commission do not extend beyond the possibility of a Commission Order on on(sic) Reconsideration.

2. This Commission has thoroughly considered all of the issues raised by Columbia in its Petition for Reconsideration in our order of June 28, 1982 in Case No. 81-366-G-30C.

3. The credit to purchased gas costs due to industrial customers in this State as a result of overcollections received by Columbia for the period November 1, 1981 through February 28, 1982, will be of more benefit to the industrial community if they are applied against the purchased gas cost adjustment to become effective on November 1, 1982, rather than the Tier Three rates approved on June 28, 1982, for the period September 1, 1982 through October 31, 1982.

4. To insure that the standards adopted by the Commission in order to judge Columbia's future procurement efforts do not impose a burden on interstate commerce, the second sentence of the second full paragraph on page 57 of the Commission's June 28, 1982 order should be modified to read as follows:

> "Under this standard, if Columbia does not satisfactorily meet its burden, the Commission might not authorize an increase greater than that which reflects the reasonable cost of natural gas which is determined to be otherwise readily available."

ORDER

IT IS, THEREFORE, ORDERED that the Petition for Rehearing and Reargument filed by Columbia Gas of West Virginia, Inc., and the Petition for Reconsideration and Modification filed by West Virginia Industrial Intervenors, on July 8, 1982 in these cases, be, and they hereby, are, denied, and the Commission Order of June 28, 1982 be, and it hereby is, affirmed and adopted, as modified above, as this Commission's Final Order in Case No. 80-336-G-30C and Case No. 81-366-G-30C.

IT IS FURTHER ORDERED that the Executive Secretary serve a copy of this order upon all parties to this proceeding by United States First Class Mail.

A TRUE COPY

TESTE /s/HOWARD N. CUNNINGHAM
Howard M. Cunningham,
Executive Secretary

Commissioner Greer did not participate in this decision.

SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of November 1982, the following order was made and entered, to-wit:

Columbia Gas of West Virginia, Inc., a corporation
vs. 80-336-G-30C
Public Service Commission of West Virginia

Upon an appeal from, suspension and review of the final order of the Public Service Commission of West Virginia made and entered on June 28, 1982.

The Court having mautrely(sic) considered the petition s(sic) and (sic)and exhibits filed on June 28, 1982, and September 24, 1982; memorandum of West Virginia Industrial Intervenors in opposition to consolidated petition of Columbia Gas of West Virginia, Inc., for an appeal, review and suspension of an order of the Public Service Commission of West Virginia; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final order complained of; the statement of reasons for the entry of its order of the 28th day of June, 1982, filed herein by the respondent, Public Service Commission of West Virginia on November 4, 1982; and the oral argument of counsel on the 9th day of November, 1982, the date fixed by the Court for hearing upon the aforesaid petition; is of opinion that the petitioner has not shown itself entitled to the the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby denied.

It is further ordered that leave be, and the same is

hereby granted to the Public Service Commission of West Virginia to withdraw from the office of the Clerk of this Court, the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia. Justices Neely and McHugh absent.

A TRUE COPY

ATTEST:

/s/George W. Singleton
GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of November, 1982, the following order was made and entered, to-wit:

Columbia Gas of West Virginia, Inc., a corporation
vs. 81-366-G-30C
Public Service Commission of West Virginia

Upon an appeal from, suspension and review of the final order of the Public Service Commission of West Virginia made and entered on June 28, 1982.

The Court having mautrely (sic) considered the petition (sic)s and (sic) and exhibits filed on June 28, 1982, and September 24, 1982; memorandum of West Virginia Industrial Intervenors in opposition to consolidated petition of Columbia Gas of West Virginia, Inc., for an appeal, review and suspension of an order of the Public Service Commission of West Virginia; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final order complained of; the statement of reasons for the entry of its order of the 28th day of June, 1982, filed herein by the respondent, Public Service Commission of West Virginia on November 4, 1982; and the oral argument of counsel on the 9th day of November, 1982, the date fixed by the court for hearing upon the aforesaid petition; is of opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby denied.

It is further ordered that leave be, and the same is hereby granted to the Public Service Commission of West Virginia to withdraw from the office of the Clerk of this Court, the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia. Justices Neely and McHugh absent.

A TRUE COPY

ATTEST:

/s/George W. Singleton
GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

COMMERCE CLAUSE, UNITED STATES CONSTITUTION Article I, §8, Cl. 3:

The Congress shall have power to . . . regulate Commerce with Foreign Nations, and among the several States.

SUPREMACY CLAUSE, UNITED STATES CONSTITUTION. Article VI, Cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U.S.C. §717a (5):

When used in this chapter, unless the context otherwise requires—

* * *

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

15 U.S.C. §717c:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner

affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been

concluded and an order made at the expiration of the supension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

28 U.S.C. §1257(3):

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

W.Va. Code §24-2-12 (1980)

Unless the consent and approval of the public service commission of West Virginia is first obtained: (a) No public utility subject to the provisions of this chapter, except railroads other than street railroads, may enter into any contract with any other utility to operate any line or plant of any other utility subject thereto, nor which will enable such public utility to operate their lines or plants in connection with each other, but this shall not be construed to prevent physical connections between utilities supplying the same service or commodity, for temporary purposes only, upon condition, however, that prompt notice thereof be given to the commission for such action, if any, as it may deem necessary, and thereafter the commission may require such connection to be removed or discontinued; (b) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may purchase, lease, or in any other manner acquire control, direct or indirect, over the franchises, licenses, permits, plants, equipment, business or other property of any utility; (c) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may assign, transfer, lease, sell, or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof; but this shall not be construed to prevent the sale, lease, assignment or transfer by any public utility of any tangible personal property which is not necessary or useful, nor will become necessary or useful in the future, in the performance of its duties to the public; (d) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may, by any means, direct or indirect, merge or consolidate its franchises, licenses, permits, plants, equipment, business or other property with that of any other public utility; (e) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may purchase, acquire, take or receive any stock, stock certificates,

bonds, notes, or other evidence of indebtedness of any other public utility; (f) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may, by any means, direct or indirect, enter into any contract or arrangement for management, construction, engineering, supply, or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.

The commission may grant its consent in advance or exempt from the requirements of this section all assignments, transfers, leases, sales or other disposition of the whole or any part of the franchises, licenses, permits, plants, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stocks, arrangements or other transaction referred to in this section, upon proper showing that the terms and conditions thereof are reasonable and that neither party thereto is given an undue advantage over the other, and do not adversely affect the public in this State.

The commission shall prescribe such rules and regulations as, in its opinion, are necessary for the reasonable enforcement and administration of this section, including the procedure to be followed, the notice to be given of any hearing hereunder, if it deems a hearing necessary, and after such hearing or in case no hearing is required, the commission shall, if the public will be convenienced thereby, enter such order as it may deem proper and as the circumstances may require, attaching thereto such conditions as it may deem proper, consent to the entering into or doing of the things herein provided, without approving the terms and conditions thereof, and thereupon it shall be lawful to do the things provided for in such order.

Every assignment, transfer, lease, sale or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stock, arrangement or other transaction referred to in this section made otherwise than as hereinbefore provided shall be void to the extent that the interests of the public in this State are adversely affected, but this shall not be construed to relieve any utility from any duty required by this section.

NO. 82-1306

IN THE

Supreme Court of the United States

October Term, 1982

COLUMBIA GAS OF WEST VIRGINIA, INC.
Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
Respondent.

On Petition For A Writ
Of Certiorari To The
Supreme Court Of Appeals
Of West Virginia

BRIEF OF RESPONDENT
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
IN OPPOSITION

ROBERT R. RODECKER*
RICHARD E. HITT
MELISSA K. MARLAND
Public Service Commission
of West Virginia
950 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 348-2174

*Counsel of Record

March 9, 1983

QUESTIONS PRESENTED FOR REVIEW

Whether, in determining rates of a public utility, the disallowance of unreasonable expenses associated with deliveries of synthetic natural gas pursuant to a contract with an affiliate, and the establishment of natural gas purchasing standards to be followed in the future by that utility, constitute a violation of the Commerce Clause of the United States Constitution, a violation of the Supremacy Clause of the United States Constitution, a deprivation of property without due process in violation of the Fourteenth Amendment to the United States Constitution, confiscation of assests in violation of the Fourteenth Amendment to the United States Constitution or a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS

STATUTES

MISCELLANEOUS

No. 82-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COLUMBIA GAS OF WEST VIRGINIA, INC.,
Petitioner,
v.
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of West Virginia

BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IN OPPOSITION

The respondent, the Public Service Commission of West Virginia, herewith opposes the petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia filed by the petitioner, Columbia Gas of West Virginia, Inc.[1]

[1]Pursuant to Rules 22 and 34.2, respondent adopts the portions of the petition filed in response to Rule 21.1(b), (d) and (e).

ADDITIONAL STATUTORY PROVISIONS

West Virginia Code §24-1-1 provides in pertinent part:

> (a) It is the purpose and policy of the legislature in enacting this chapter to confer upon the public service commission of this State the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to:
>
> * * *
>
> (4) Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference and based primarily on the costs of providing these services; . . .
>
> * * *
>
> (b) The legislature creates the public service commission to exercise the legislative powers delegated to it. The public service commission is charged with the responsibility for appraising and balancing the interests of the State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

STATEMENT OF THE CASE

The petition filed in this case arises out of two cases before the Public Service Commission of West Virginia (Commission), Case Nos. 80-336-G-30C and 81-366-G-30C. Both of these cases were filed by Columbia Gas of West Virginia, Inc. (Columbia) to pass through to its customers purchased gas costs pursuant to the Commis-

sion's purchased gas adjustment (PGA) procedure.[2] The dispute which has led to the filing of the petition herein results from the disallowance by the Commission of certain gas expenses emanating from a contract between Columbia and its affiliate, Columbia LNG Corporation (LNG Corporation). In order to understand adequately the factual situation which gave rise to the subject case, it is helpful to review the past history of the aforesaid contract as it involves the Public Service Commission.

BACKGROUND

In 1973, the Petitioner entered into a contract with LNG Corporation for the purchase of synthetic natural gas (SNG) at LNG Corporation's reforming plant in Green Springs, Ohio, with a contract term of ten years. The contract contains what is known as "take or pay" provisions, which require that Columbia must pay for total contract volumes whether or not Columbia actually uses, or takes, those volumes.[3] Columbia did not file a petition with the

[2]Rule 30C of the Commission's *Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle* is a voluntary accelerated rate procedure available to natural gas utilities subject to the jurisdiction of the Commission. Rule 30C provides a mechanism whereby gas utilities may recover increases in the cost of gas purchased from their suppliers in a more timely fashion than would be possible in a general rate proceeding. The purchased gas costs derived from Rule 30C reflect the actual cost of gas from suppliers, and adjustments for allowable line losses and taxes and over or under recoveries from a preceding twelve month period. Rule 30C applications are to be filed on or before August 1 of any given year and increased rates pursuant to Rule 30C go into effect on November 1 of that same year.

[3]Pursuant to the contract between Columbia and LNG Corporation, Columbia is obligated to take, or pay for, 4,954,100 Mcf of SNG per year.

Commission seeking approval of and consent to Columbia's entering into the contract as required by *West Virginia Code* §24-2-12.[4]

In 1976, after learning of the contract, the Commission ordered Columbia to submit the contract to the Commission for review, pursuant to the aforesaid *Code* section, in West Virginia Public Service Commission Case No. 8000, reported at 63 ARPSCWV 559.[5]

On August 10, 1976, Columbia filed a petition requesting the Commission's consent to and approval of the sales agreement between Columbia and LNG Corporation. By order entered on Dec. 10, 1976, in Case No. 8817, 64 ARPSCWV 1029, the Commission stated:

> "IT IS, THEREFORE, ORDERED that the Commission should and hereby does, grant its consent to the entering into the aforesaid sales agreement and service agreement by Columbia, without approving the terms and conditions thereof; provided, however, that such consent shall not be deemed to bind the Commission in any ratemaking proceeding involving Columbia."

Beginning with Case No. 8000 and extending through a long series of general rate proceedings and Rule 30C pro-

---

[4] *West Virginia Code* §24-2-12 is set forth *in toto* in the Appendix to the Petition for a Writ of Certiorari in this case, cited as Pet. App., 146a, 147a. The pertinent provision states as follows: "Unless the consent and approval of the public service commission of West Virginia is first obtained . . . (f) No public utility subject to the provisions of this chapter . . . may, by any means, direct or indirect, enter into any contract or arrangement for management, construction, enginenering, supply, or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest."

[5] Annual Report of the Public Service Commission of West Virginia.

ceedings, including Cases Nos. 8817, *supra;* 9147, 66 ARPSCWV 488 (1978); 79-088-G-42T, ______ ARPSCWV ______ (July 17, 1980); and 79-279-G-30C, 67 ARPSCWV 1362 (1979), the Commission has refused to allow Columbia currently to recover in its rates the full costs associated with the SNG contract.

THE CASE BELOW

The instant case arises out of the two aforesaid Rule 30C proceedings before the Public Service Commission. On August 1, 1980, Columbia filed an application with the Commission to change rates for natural gas service in compliance with the Commission's Rule 30C, which case was designated as Case No. 80-336-G-30C. By order entered by the Commission on August 27, 1980, the application was set for hearing to be held on October 7, 1980, at which time the parties to the proceedings were to address all relevant issues, including: (1) the need for synthetic natural gas based upon the most recent gas supply-demand data; and (2) considering recent communications from Columbia to the Commission, the extent to which SNG and liquified natural gas (LNG) could be replaced by other supplies of gas. Columbia was also ordered to present detailed evidence related to the reasonableness of its proposed purchased gas costs in general. That hearing was held as scheduled with further hearings being held in October of 1980.

On October 31, 1980, the Commission issued an Interim Order in that case, approving an interim purchased gas cost for Columbia to be effective for all gas supplied on and after November 1, 1980, which rate was to be subject to modification as the result of any subsequent decision regarding the cost of SNG and its inclusion in Columbia's cost of purchased gas.

On August 3, 1981, Columbia filed another application

with the Commission pursuant to Rule 30C, seeking a further increase in rates to reflect increased purchased gas costs to be effective November 1, 1981, which case was designated as Case No. 81-366-G-30C.

On October 30, 1981, the Commission issued its final order in Case No. 80-336-G-30C, determining that it had the authority and jurisdiction to exclude, from Columbia's cost of purchased gas, the full cost of the SNG volumes purchased by Columbia from LNG Corporation and to reprice those volumes to the projected Columbia Gas Transmission Corporation (Transmission Corporation) average commodity rate. Additionally, the Commission ordered that the repricing of SNG to the actual pipeline rate per Mcf be reflected in the actual cost recovery mechanism of Rule 30C in Case No. 81-366-G-30C. Also on October 30, 1981, the Commission issued an order in Case No. 81-366-G-30C, which established a procedural schedule in that case calling for further hearings to be held beginning in January of 1982, and allowed Columbia to place an increased purchased gas increment into effect, pending the further hearings and final decision.

On November 9, 1981, Columbia filed a Petition for a Corrective Order or for Rehearing and Reargument in Case No. 80-336-G-30C, as well as a Petition for Hearing and Argument with respect to the portion of the order in Case No. 81-366-G-30C which adopted the policy of repricing SNG in accordance with the Commission's order in the 1980 case, which petitions were consolidated for hearing. Hearings commenced in the consolidated cases on January 20, 1982 and terminated on February 8, 1982.

The evidence adduced during the hearings held in January and February of 1982 established that: 1) the SNG volumes supplied under the contract with LNG Corporation to Columbia were not needed to serve Colum-

bia's West Virginia customers; 2) Columbia has the right under three different supply contracts with Transmission Corporation to demand more than twice the amount of natural gas needed to serve its West Virginia supply area; and 3) Transmission Corporation had sufficient excess gas supplies to meet any demand which Columbia would have in its service territory. (Pet. App., 79a-86a and 108a-111a). For contract year 1981,[4] Transmission Corporation had 128.1 Bcf of gas available to meet a hypothetical 2.5 Bcf short-fall of Columbia if the SNG volumes were unavailable. The evidence in the 1981 case indicated that for contract year 1982, Columbia had the right, under the three supply contracts with Transmission Corporation, to demand 127.3 Bcf on an annual basis, and such volumes would be sufficient to make up any potential short-fall associated with a failure to take the SNG. (Pet. App., 84a). The cost of SNG for the 1982 contract year, before consideration of West Virginia Business and Occupation Taxes, was $5.952 per Mcf, while the average commodity rate which Columbia was projected to pay Transmission Corporation for all of its other gas volumes was $3.853 per Mcf for the same rate period. (Pet. App., 129a).

On June 28, 1982, the Commission issued its consolidated Order on Reconsideration in Case No. 80-336-G-30C and Final Order in Case No. 81-366-G-30C, repricing the SNG volumes to a rate of $3.853 per Mcf, which includes $0.35 per Mcf transportation charge recovered by Transmission Corporation under its SGES schedule.

---

[4]A contract year runs from November 1 of the previous year through October 31 of the contract year; thus, contract year 1981 represents the period from November 1, 1980 through October 31, 1981, and contract year 1982 represents the period from November 1, 1981 through October 31, 1982.

Based on the evidence, the Commission determined that it was unreasonable to require Columbia's West Virginia customers to pay the full cost of the SNG volumes in Columbia's rates when those volumes were not needed to serve Columbia's West Virginia customers and were of no practical benefit to Columbia's West Virginia service territory. (Pet. App., 79a-86a).

The other major section of the Commission's Order of June 28, 1982, dealt with the reasonableness of Columbia's management practices and gas procurement policies. The Commission determined that it had the authority and obligation to investigate the reasonableness of Columbia's purchasing practices with regard to the volumes of natural gas which it buys and its management practices with regard to the operation of the company. (Pet. App., 93a-106a).

During the course of hearings, the Commission received extensive testimony from residential customers, representatives of industrial firms and union representatives detailing problems which were caused by continued increases in utility bills, particularly by bills for natural gas service. The industrial sector is the only area of Columbia's market which has real growth potential, but this market is also the market which is most price sensitive due to its capacity to switch to alternate fuels. For contract year 1982, the West Virginia industrial load was expected to comprise 40% of Columbia's total annual sales, but Columbia's industrial customers have the alternate fuel capacity to replace up to 24% of Columbia's total sales with No. 2 or No. 6 Fuel Oil. (Pet. App., 100a). Columbia could lose 10% of its projected sales contract year by the switching of one industrial customer (Weirton Steel Division of National Steel Corporation) to No. 6 Fuel Oil. (Pet. App., 100a).

However, the evidence in the case demonstrated that, in spite of the importance of Columbia's industrial load to its

annual sales and the extreme price sensitivity of this market, Columbia had made no effort to keep the price of natural gas as low as possible. The Commission found that there was no single management employee in the Columbia Gas System whose responsibility it was to look out for the interests of Columbia's customers in the Columbia Gas System and that Columbia had made no effort to attempt price adjustments which would encourage growth for the industrial market. (Pet. App., 101a). The evidence further indicated that Columbia had never conducted any price elasticity studies in order to determine the optimal level of natural gas rates in order to maximize customer load and had made no effort to determine at what point natural gas increases would be created by no rate increase. (Pet. App., 101a-2a).

The record in the case demonstrated that: 1) Columbia had not aggressively sought out supplies of gas other than Transmission Corporation gas, even though those other supplies may be priced at a cheaper rate; 2) Columbia had never inquired into or contested the mix of gas supplied to it by Transmission Corporation; 3) Columbia had not actively participated in cases before the Federal Energy Regulatory Commission which could result in lower prices charged by Transmission Corporation to Columbia and Transmission Corporation's other customers; 4) Columbia had failed to attempt to renegotiate the SNG contract with LNG Corporation, even in light of the considerable volumes of cheaper gas available to Columbia; and 5) Columbia never attempted to sell the SNG to a third party, either through an off-system sale or through a private contract with a company willing to pay a higher price for an assured supply of natural gas. The evidence in the case demonstrated that Columbia's management simply relied upon Transmission Corporation to acquire gas supplies at the most reasonable price and that Columbia's management was uninformed regarding contracts between

Transmission Corporation and its suppliers. A summary of the evidence concerning Columbia's management practices and gas procurement policies is set forth in the Appendix to the Petition for a Writ of Certiorari in this case at pages 94a through 103a.

As a result of the evidence and record established in this case regarding Columbia's management practices and gas procurement policies, the Commission set forth four new standards of care to be followed by Columbia in the Future. The first standard would require Columbia to let out bids for the purchase of some quantity of natural gas supplies needed to fulfill its customer requirements. The second standard, as modified, would require Columbia to make a substantial effort to purchase more Appalachian gas, which standard was established in light of the evidence presented in the case that Columbia refused to bargain on a good faith basis with local producers and refused to pay local producers a rate for gas even remotely approaching the Transmission Corporation commodity rate. (Pet. App., 102a). The third standard would require Columbia to bear the burden of demonstrating that dependable lower-priced supplies of natural gas are not readily available from other sources and that any contracts between Columbia and a corporate affiliate are not detrimental to the customers of Columbia. The fourth standard would require Columbia to demonstrate efforts which it has taken to represent more adequately the interests of its West Virginia customers in the Columbia Gas System, as opposed to subordinating the interests of its service area to those of the Columbia Gas System as a whole.

On July 8, 1982, Columbia filed a Petition for Rehearing and Reargument in both cases.

On August 25, 1982, the Commission issued an order on the Petition determining that there was no further consideration that could be given to the 1980 case, since the

petition of November 7, 1981 exhausted the administrative remedies available to any party in that case. The Commission additionally denied the petition filed in the 1981 case.

On July 28, 1982, and September 24, 1982, Columbia filed petitions for appeal from the Commission's Orders of June 28 and August 5, 1982, with the West Virginia Supreme Court of Appeals. The two petitions were set for hearing to be heard by the West Virginia Court on November 9, 1982. Following oral argument, on November 9, 1982, the West Virginia Supreme Court of Appeals denied the petitions filed by Columbia in both cases.

It is from those orders of the West Virginia Supreme Court of Appeals that the Petitioner seeks the review of this Court by Certiorari.

REASONS FOR DENYING THE WRIT

While the impact of the Commission's decisions complained of herein are significant to Petitioner, Petitioner has failed to demonstrate a justification for further review of the Commission's decision by this Court. As demonstrated below in a brief analysis of the five claims raised in the petition, the actions of the Commission are consistent with statutory responsibilities, do not conflict with relevent decisions of this Court or other courts, and do not involve a question of Federal law which has not been settled by this Court. Under the circumstances the Court should deny the petition.

I. West Virginia Has Not Violated the Commerce Clause of the United States Constitution

The Petitioner in this case contends that the Public Service Commission of West Virginia has committed two acts repugnant to the Commerce Clause of the United States Constitution. First, the Petitioner asserts that the Com-

mission's action in repricing the SNG volumes constitutes an impermissible interference with interstate commerce. Second, Columbia asserts that the new standards set forth in the Commission's orders, by which Columbia's practices of acquiring natural gas will be examined in future regulatory proceedings, constitute economic protectionism which is incompatible with the requirements of a freeflowing interstate commerce. Columbia has misstated both of the Commission's actions in its petition.

The Commission's action to reprice the SNG volumes neither places an impermissible burden on interstate commerce nor prohibits Columbia from carrying out its obligations under the SNG contract.[7] The Commission's action to reprice the SNG volumes merely regulates prices to recover costs incurred by a local distribution company engaged in intrastate commerce and does not attempt to regulate the rate for gas delivered in interstate commerce. This Court has long upheld the authority of states to regulate direct sales by a company for consumptive uses in intrastate commerce, whether by an intrastate public utility such as Columbia, or by an interstate pipeline company. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission,* 332 U.S. 507 (1947); *Public Utilities Com-*

---

[7]The Federal Power Commission determined that it has no authority to regulate contracts for the sale of SNG volumes since the provisions of the Natural Gas Act apply only to the sale in interstate commerce of unmixed natural gas or any mixture of natural and artifical gas. *Re: Columbia LNG Corporation,* FPC Opinion No. 669, 1 PUR4th 574 (1973); *Re: Algonquin SNG Inc.,* FPC Opinion No. 637, 97 PUR3d 299 (1972). The *Algonquin* decision of the FPC was expressly affirmed in *Henry* v. *Federal Power Commission,* 513 F. 2d 395 (1975) and again in *Public Service Commission of New York* v. *Federal Power Commission,* 543 F. 2d 392 (1976). Thus, since the applicable Federal regulatory authority has determined that it has no jurisdiction over contracts for the sale of unmixed synthetic natural gas, there can be no Federal preemption of the SNG contract.

mission of Ohio v. *United Fuel Gas Company,* 317 U.S. 456 (1943); *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Company,* 341 U.S. 329 (1951); *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation,* 365 U.S. 1 (1961); *Federal Power Commission* v. *Southern California Edison Company,* 376 U.S. 205 (1964).

Additionally, the Commission's action to reprice the SNG volumes does not violate the plain language of the Commerce Clause, since the decision does not impose a direct burden upon interstate commerce, but merely regulates the sale and delivery of natural gas in intrastate commerce by a public utility subject to state regulation. *Missouri* v. *Kansas Natural Gas Company,* 265 U.S. 298 (1924); *Federal Power Commission* v. *Southern California Edison Company,* 376 U.S. 205 (1964); *Great Atlantic and Pacific Tea Company, Inc.,* v. *Cottrell,* 424 U.S. 366 (1976).

Finally, this Court has previously held that it is appropriate for a regulatory body to disallow expenses which reflect managerial inefficiency, waste, imprudence, or abuse of discretion and that intercorporate agreements among affiliates do not control the price to be paid by consumers if the resulting rates require the ratepayers to bear unfair or unreasonable costs. *West Ohio Gas Company* v. *Public Utilities Commission of Ohio,* 294 U.S. 63, 72 (1935); *Smith* v. *Illinois Bell Telephone Company,* 282 U.S. 133 (1930); *Western Distributing Company* v. *Kansas,* 285 U.S. 119 (1932); *Dayton Power & Light* v. *Public Utilities Commission of Ohio,* 292 U.S. 290 (1934); *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio,* 292 U.S. 398 (1934).

The Petitioner asserts that the new gas procurement standards announced by the Commission seek specifically to put West Virginia gas in a favorite position *vis-a-vis* gas produced in other states and transported in interstate com-

merce and, thus, are "obvious manifestations of parochialism." The new standards imposed upon Columbia by the Commission regarding its gas procurement policies do not impose an impermissable burden on interstate commerce. They are reasonable standards by which to judge the efforts of an intrastate distribution company to provide its customers with the most reasonably priced and readily available supplies of gas. The standards require Columbia to purchase the least cost gas readily available and to exercise greater judgement and independence in its gas procurement policies. The standard requiring Columbia to make more of an effort to purchase West Virginia gas is simply a recognition that the evidence in the instant cases demonstrated that, currently, the gas available in West Virginia and the Appalachian area is less expensive than the gas currently being purchased by Transmission Corporation and is considerably less expensive than the cost of the SNG purchased by Columbia from LNG Corporation. The evidence indicates that Columbia has refused to deal with Appalachian producers on an equitable basis (Pet. App., 102a). The new standards merely require Columbia to treat all potential gas supplies on an equal footing, whether they are locally produced or delivered by an interstate pipeline.

Moreover, the new standards enunciated for future application to Columbia's gas procurement policies are not yet ripe for judicial review. They were not applied to Columbia in the instant cases. The reasonableness of those standards will be further addressed by the Commission and the Commission's Staff when they utilize those standards for the first time. If the Commission applies those standards to Columbia's purchasing practices, and, as a result, refuses to allow Columbia to fully recover in rates future purchased gas costs, Columbia will have an opportunity to fully litigate the appropriateness of those standards. Any underrecovery of gas costs subsequently deter-

mined to be legitimate by a reviewing court would be included in the over/underrecovery mechanism of Rule 30C. Thus, the action of establishing standards for future application fails to meet the two-pronged test for ripeness set forth by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Those criteria are: 1) fitness of the issue for judical decision and 2) the hardship to the parties of withholding Court consideration.

II. The Commission Has Not Violated the Supremacy Clause

Columbia argues that the Commission has intruded upon a federally preempted area by denying a transportation cost incurred by Columbia under a FERC-approved tariff in the process of repricing SNG to the Transmission Corporation average commodity rate. Columbia has misunderstood the action of the Commission with regard to the transportation costs. The average commodity rate charged by Transmission Corporation to Columbia Gas of West Virginia consists of two increments — the actual cost of the natural gas and a transportation charge. In the $3.853 per Mcf average commodity rate, 35 cents per Mcf represents the transportation charge and $3.503 represents the actual cost of the natural gas per Mcf. The Commission repriced the SNG volumes to the $3.853 total rate which includes the transportation charge pursuant to the FERC-approved tariff. The Commission has not attempted to look behind the transportation costs or determine whether or not the transportation charge is just and reasonable. The Commission has merely prohibited Columbia from recovering the same transportation charge twice. Columbia is entitled to recover in its rates a transportation charge assessed upon it for each Mcf of gas delivered to it by Transmission Corporation; however, Columbia is not entitled to recover that transportation

charge per Mcf more than one time for each Mcf delivered. Thus, the Commission has not intruded into a federally preempted area or attempted to look behind the federally approved transportation charge contained within the FERC-approved tariff of Transmission Corporation.

Columbia asserts that by establishing new standards by which this Commission would review the reasonableness of Columbia's purchases from Transmission Corporation, the Commission has transgressed into an area preempted by the Federal Government and is attempting to pass upon the rate charged for gas delivered to Columbia by Transmission Corportion, when those volumes are being priced at a rate approved by the Federal Energy Regulatory Commission. The Commission is doing no such thing. The Commission does not wish to regulate the rate Transmission Corporation charges to Columbia. That is not the intent of the new standards. However, if Columbia can purchase gas from sources other than Transmission Corporation which is less expensive than the gas which it purchases from Transmission Corporation, but fails to do so, then Columbia may not be exercising sufficient care in its gas purchasing practices. In this regard, the Commission is obligated to ensure that the rates and charges of Columbia of West Virginia are just and reasonable. *West Virginia Code,* §24-1-1(a) (4). The Commission discussed this issue at length in its order. (Pet. App., 87a-106a).

Finally, these new standards are not yet ripe for judicial review in that the Commission did not apply them to Columbia's purchases from Transmission Corporation in the cases at bar and has not yet applied them in Columbia's most recent 30-C filing before the Commission, Case No. 82-379-G-30C, which is currently pending.

III. West Virginia Has Not Deprived Columbia of Property Without Due Process of Law

The Petitioner asserts that, by repricing the SNG volumes, the Commission has in some way deprived Columbia of property without due process of law because the Commission has not previously articulated standards by which the SNG contract would be judged. Columbia asserts that it knew only that, in 1976, the Commission had examined the SNG contract and found it to be unobjectionable and that it had no idea that the Commission could attempt years later to repudiate its approval of that contract. (Petition, at 20). Columbia states that even if it had known that the Commission would, or could, retract its imprimatur at this late date, it had no way of predicting the standards by which the review of the contract would be made. (Petition, at 20).

Columbia entered into the SNG contract in 1973, three years before it was ever presented to the Commission. Thus, it would have been impossible for the Commission to articulate standards by which the contract would be judged in the future, when that contract was entered into without the Commission's knowledge and in violation of a section of the *West Virginia Code* which requires the utility to obtain Commission approval prior to entering into certain agreements with affiliates. (*West Virginia Code* §24-2-12, Pet. App., 146a) In any event, Columbia had ample knowledge of the Commission's intent to scrutinize the reasonableness of SNG expenses. On June 16, 1976, in Case No. 8000, 63 ARPSCWV 559, the Commission addressed the SNG contract for the first time. In that decision, at pages 574-575, the Commission pointed out that it need not address the legal and constitutional questions raised by the SNG contract, stating that:

> Columbia (W.Va.) admits in its brief that the charges resulting from the sale of synthetic gas

> may be subjected to a subsequent review by the Commission. That "subsequent review" is now. In other words, even if Columbia (W.Va.) must pay Columbia LNG Corporation according to contract, this Commission can disallow, for *ratemaking purposes,* a portion of the actual costs as unreasonable, excessive, improvidently incurred, or sought to be too quickly recoverable in rates to West Virginia customers . . . .
>
> In summary, therefore, even if we assume that we do not have the jurisdiction to decide the price which Columbia (synthetic) can charge Columbia (W.Va.), the Commission concludes as a matter of law that it has the jurisdiction for ratemaking purposes to adjust the actual cost to Columbia (W. Va.) of its synthetic gas purchases during the test period . . . .

In that case, the Commission denied full current recovery of the cost of SNG.

In Case No. 8817, 64 ARPSCWV 1029 (1976), the Commission did grant its consent to the entering into the SNG sales agreement and service agreement, although "without approving the terms and conditions thereof; provided, however, that such consent shall not be deemed to bind the Commission in any ratemaking proceedings involving Columbia." In Case No. 9147, 66 ARPSCWV 488 (1978), the Commission again discussed the SNG volumes stating that:

> It was decided as a matter of law in Case No. 8000 that for ratemaking purposes, the Commission has the jurisdiction to adjust the actual costs incurred by Columbia associated with SNG. In Case No. 8000, it was ordered that certain adjustments be made in the estimated cost of service prepared by Columbia LNG each year . . . .

The Commission upholds the precedent established in Case No. 8000 of reviewing SNG costs to determine their reasonableness.

In Case No. 79-088-G-42T, Interim Order, August 27, 1979, _____ ARPSCWV _____, the Commission ordered the parties to Columbia's rate case to address the question of whether *any* level of cost recovery for SNG was just and reasonable for Columbia under the circumstances of the case. In the Final Order in Case No. 79-088-G-42T, July 17, 1980, the Commission discussed the adjustments to the SNG costs which had been made in Case Nos. 8000, 8807, and 9147 and which had been made in the interim phase of that case. In Case No. 79-279-G-30C, Columbia was ordered during the hearing to address the reasonableness of its SNG costs (Final Order, October 26, 1979). Finally, Columbia was put on notice in the order of August 27, 1980, in Case No. 80-336-G-30C, that the issue of the need for SNG and the reasonableness of the cost of the SNG would be an issue in that case. Thus, it is disingenuous for Columbia to assert that it had no knowledge that it could not rely upon the Commission's "approval" of its entry into the SNG contract by order entered in 1976.

Columbia's argument that it has been deprived of due process depends in large measure upon the proposition that once a regulatory body approves the inclusion of an expense in a company's cost of service, the agency must approve the pass-through of that expense in all future proceedings involving the same company, regardless of future developments which may alter the appropriateness of the expense. Such a proposition is not in accordance with well-settled law. This Court has long held that a regulatory body must be free to adapt its policies and decisions when faced with new developments or changing circumstances and that a decision of a regulatory body limiting contractual arrangements may not be set aside because the agency

reached a different result on an earlier occasion. *American Trucking Association v. Atchison, Topeka, and Santa Fe Railway Company*, 387 U.S. 397, 416 (1966); *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); See 2 K. Davis, *Administrative Law* §18.09, at 610 (1958).

Columbia additionally asserts that it had no way of knowing what standards the Commission may have used to determine that a portion of the SNG costs were not reasonable and should not be recovered from West Virginia ratepayers. Yet the SNG costs have always been subject to the same examination and test to which any rate case expense is subject; i.e., is it reasonable and is it necessary? The Commission examined the evidence presented in the case and utilized its standard ratemaking analysis in evaluating reasonableness of this particular cost. The Commission looked at the cost of the SNG and the volumes of the SNG and examined the actual demand for natural gas of Columbia's customers. The Commission evaluated the amount of natural gas purchased from Transmission Corporation by Columbia, the amount of gas which Columbia has the right to demand on an annual basis from Transmission Corporation and the amount of gas Transmission Corporation was prepared to supply to Columbia in each of the pertinent 30C periods. On the basis of that analysis, the Commission came to the conclusion that the SNG volumes were not needed to serve Columbia's customers in West Virginia because Transmission Corporation had planned to provide Columbia with enough gas to serve virtually the entire load estimated by Columbia and because Columbia had the right to demand almost twice as much gas in the pertinent years as it actually needed to serve its customers. The Commission used no unusual or previously unknown analysis in reaching its decision in the case with regard to the need for SNG. After examining the evidence, the Commission determined that it was unreasonable to require West Virginia customers to

pay a higher cost for natural gas than was actually needed to supply them with adequate gas service. In short, the SNG expense was neither reasonable nor necessary.

Columbia has not been deprived of its property without due process of law by the Public Service Commission. Columbia has known since 1976 that the Commission was not bound to the terms of the SNG contract for ratemaking purposes and Columbia has known that the Commission has adjusted the actual cost recovery of the SNG volumes in each of Columbia's rate cases since that time.

IV. The Action of the Commission Has Not Resulted in Confiscation

To the extent that the Commission's Orders result in a rate of return on Columbia's investment which is inadequate, said inadequacy does not amount to unconstitutional confiscation.

Columbia did not, and could not, refer to any case which stands for the proposition which it advances herein, *viz.*, that notwithstanding a finding that expenses are unreasonable, the Commission must require the ratepayers to reimburse the utility if the failure to do so would result in the company's inability to earn its authorized rate of return. Indeed, this Court has previously disavowed such a result.[8]

In carrying out its statutory responsibilities, the Commission determined that the rates requested by Petitioner associated with SNG costs were unjust and unreasonable. (Pet. App., 124a, 125a). If, in order to permit the com-

---

[8]In *Acker* v. *United States* 298 U.S. 426 (1939), the issue before the Secretary of Argiculture was, as it is here, the reasonableness of an expense item, not confiscation. As in *Acker*, the Petitioner herein would require the ratepayers to be bound by managerial judgment even where an expense is found to be extravagant or unnecessary.

pany to earn its rate of return, the Commission were to permit the company to collect rates based upon these unjust expenses, the balancing process which the Commission is required to perform would be weighed entirely in the utility's favor and against the interests of the consuming public. That is not the result contemplated by the West Virginia Legislature and that is not the result which this Court has permitted in the past. *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968).

The issue of confiscation must be considered in the context of a Commission's statutory responsibility to ensure just and reasonable rates. Consequently, if an expense item is found to be unreasonable, to charge consumers for such expenses would require them to pay unjust and unreasonable rates. Under the Company's theory of confiscation, if a utility were to fail to achieve its authorized rate of return due to the Commission's disallowance of an expense item, the Commission would be required to make rates sufficient to compensate the company for its expenditures. In *Acker* v. *United States*, 298 U.S. at 431, this Court held that in the consideration of a charge for public service "regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs." Also, the *Hope*,[9] *Permian Basin*[10] and *Bluefield*[11] decisions assumed efficient and economic management decisions. The record before the Commission demonstrated that Columbia's management was not efficient or economical with regard to the SNG expense. There was no effort made on Columbia's part to mitigate the impact of this high priced supply. The record shows no

---

[9]*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944).

[10]*Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)

[11]*Bluefield Water Works and Improvement Company* v. *Public Service Commission*, 262 U.S. 679, 692, 693 (1923)

evidence of an attempt to find other buyers for the SNG and no evidence of an attempt to renegotiate the contract.

Confiscation must logically be determined on the basis of a return calculated using just and reasonable expenses with careful and prudent management. On such a basis, there has been no suggestion made that the Company's financial integrity has been impaired. If the question of confiscation should be determined on the basis of expenses actually incurred, there would be little reason for a regulatory commission to exist. Utilities could, under the guise of management discretion and the protection of a misguided theory of confiscation, incur extravagant expenses at no risk to the shareholders. Clearly, that is not the result contemplated by this Court in any of its decisions and is contrary to the history of regulation.

It is well-settled law that regulation does not insure that the business shall produce net revenues. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942).

Indeed, this fact was recognized in one of this Court's leading cases on ratemaking. *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 603 (1944). This Court has repeatedly held that the company is required to provide service in a reasonably efficient and economical manner. The public cannot be required to pay rates to cover operating expenses in excess of those which would be incurred by a reasonably prudent management. Recorded operating expenses for a public utility enterprise need not be accepted by regulatory authorities for the purpose of fixing rates in the absence of a showing that such expenses are reasonable in amount. *San Diego Land & Town Company* v. *Jasper*, 189 U.S. 439 (1903). This Court held long ago that:

> [w]hile the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subser-

> vient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses'.
> *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U.S. 339, 346 (1892)

The Public Service Commission Law of West Virginia requires the Commission to ensure that rates and charges for utility services are "just" and "reasonable". *West Virginia Code* §24-1-1(a) (4). Also,

> [t]he public service commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions. *West Virginia Code* §24-1-1(b)

In determining whether rates requested are just and reasonable, it is perfectly appropriate for the commission to disallow expenses resulting from managerial inefficiency, waste, imprudence, or abuse of discretion. *West Ohio Gas Company* v. *Public Utilities Commission of Ohio*, 294 U.S. 63, 72 (1935). It has previously been held that an intercorporate agreement among affiliates does not control the price to be paid by consumers if the rate thereby established results in unfair or unreasonable costs to the utility and its ratepayers. *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133 (1930); *Western Distributing Company* v. *Kansas*, 285 U.S. 119 (1932); *Dayton Power & Light* v. *Public Utilities Commission of Ohio*, 292 U.S. 290 (1934); *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio*, 292 U.S. 398 (1934).

V. The Commission's Order Does Not Deny Columbia the Equal Protectionof the Laws

Columbia asserts that the Commission has approved full cost recovery for SNG purchases of four other gas utilities while it has singled Columbia out for cost disallowance. Consequently, Columbia's argument is that it has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. (See, Pet., 24-27).

The Commission has rejected this argument in its Order. The Commission's rationale for so doing is based upon findings that Columbia is not situated similarly to the other utilities and that administrative realities and constraints justify the procedure employed by the Commission. (Pet. App., 74a-76a).

The basis for the Commission's determination that Columbia is not situated similarly to the other SNG purchasers is founded upon factual determinations that Columbia is several times larger than the other utilities put together, that Columbia, unlike the other utilities, services several of the largest industries and employers in the State which have significant impact upon the State's welfare and economy, and that Columbia is the only Company which is affiliated with the supplier of the SNG. (Pet. App., 75a).

With respect to administrative realities and constraints, the Commission noted that the logical extension of Columbia's argument would require the Commission to join every utility in the State to a specific rate case before disposition of an issue which may be applicable to those other utilities. Otherwise, at any given point in time, the utilities would not be treated equally. Obviously, this is administratively impossible and is not required by the rate setting procedures. The case of *Cotting* v. *Kansas City Stockyards Company*, 183 U.S. 79, 119 (1901), cited by

Columbia on page 26 of its Petition, was an equal protection case dealing with an act of a state legislature. The holding of the Court in that case is simply not applicable to rate-setting procedures employed by a state regulatory commission. Upon enactment, legislation, by its nature, immediately defines and limits the class to which it applies. On the other hand, a rate case before the Commission involves a specific utility and the particular issue of whether that utility's costs are reasonable. To the extent principles are established in determining the reasonableness of costs which could be applicable to other utilities, the Commission will endeavor to analyze those principles within the context of a particular case. Accordingly, based upon its disposition of the issue in the Columbia case, the Commission stated its intention to investigate the reasonableness of SNG purchases by any other utility subject to its jurisdiction. (Pet. App., 76a).[12]

With respect to the affiliation issue, Columbia has ignored the clear provisions of §24-2-12 of the *West Virginia Code, supra,* which provide that contracts between a utility and its affiliate are subject to Commission scrutiny. There is no express statutory provision with respect to Commission scrutiny of contracts between a utility and a non-affiliate. Additionally, Columbia has cited no authority for its proposition that affilialtion cannot be a basis for dissimilar treatment because the authority is to the contrary. Courts have long recognized the basis for a legitimate distinction by a regulatory agency of an arrangement between utilities and affiliates *vis-a-vis* non-

[12]Pursuant to its stated intention, cases (Rule 30C applications) involving the recovery of purchased gas costs which include SNG purchases by all other utilities in the State (five cases) have been set for hearing by the Commission. These cases are presently scheduled to go to hearing in April, 1983, wherein parties will be given an opportunity to present testimony and argument regarding the SNG issue.

affiliates involving similar expenses and have found such distinctions not be a denial of equal protection of the laws. (See, *General Telephone Company of Upstate New York* v. *Lundy*, 17 N.Y. 2d 373, 271 N.Y.S. 2d 216, 218 N.E.2d 274, 281-282 (1966), citing to *American Telephone & Telegraph Company* v. *United States*, 299 U.S. 232, 239 (1936); *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio*, 292 U.S. 398, 400 (1934); *Dayton Power & Light Company* v. *Public Service Commission of Ohio*, 292 U.S. 290, 295 (1934); *Western Distributing Company* v. *Public Service Commission*, 285 U.S. 119, 124 (1932); *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133, 152-53 (1930)).

In conclusion, Columbia has not been denied equal protection of the law because it is not situated similarly to other SNG purchasers. Additionally, the Commission is presently undertaking to investigate the reasonableness of SNG purchases by all utilities subject to its jurisdiction in individual cases involving an application by each utility to recover its purchased gas costs.

CONCLUSION

There being no conflict between the actions of the Commission and the relevant decisions of this Court involving a decision of a federal question, or the decisions of other courts, the petition should be denied.

Respectfully submitted,

ROBERT R. RODECKER*
RICHARD E. HITT
MELISSA K. MARLAND
950 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 348-2174

Attorneys for Respondent
Public Service Commission
of West Virginia

*Counsel of Record

March 9, 1983